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Supreme Court of the United States

October Term, 1980

No. 79-2044

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, JOHN D. BLANKINSHIP, JACK CORBETT, FLORENCE FLAST, JEFFERSON FORDHAM, ANDREW LEE GUNN, HELEN C. HELLER, ARYEH NEIER, JOHN RYOR, HOWARD M. SQUADRON, and JAMES E. WOOD,
Appellants,

against

SHIRLEY M. HUFSTEDLER, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION; TERREL H. BELL, UNITED STATES COMMISSIONER OF EDUCATION, and IRVING ANKER CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Appellees,

and

JAMES BOVIS, BESSIE BOVIS, LENA MCPHATTER, CEPHUS MUMFORD, JACQUELINE MUMFORD, PATRICIA ORLANDO, FRUCTUOSO PEREZ, ELBA PEREZ, NELSON RIVERA, GLORIA RIVERA and ANITA SMITH,
Intervenor-Appellees,

MR. AND MRS. PHILIP FENSTER, MR. AND MRS. PHILIP LEVITZ and MR. AND MRS. L. SWIRDLOW,
Intervenor-Appellees.

STATEMENT OF JURISDICTION ON BEHALF OF APPELLANTS

LEO PFEFFER
Attorney for Appellants
15 East 84th Street
New York, New York 10028
(212) 879-4500

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STATEMENT OF JURISDICTION ON BEHALF OF APPELLANTS

The appellants herein file this Statement as the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the judgment in question, and should exercise that judgment.

Opinion Below

The opinion of the United States District Court for the Southern District of New York, upholds the constitutionality of Title I, Section 205 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e-1(a) as amended), insofar as it authorizes use of federal funds to finance the assignment of teachers and other personnel to religious schools in order to perform educational services during regular school hours. The opinion of the District Court, as yet unreported, and the judgment appealed from are set forth in the Appendix hereto and marked Appendix "A" and Appendix "B", respectively.

Jurisdiction

The appeal herein is from a final judgment made and entered in the United States District Court for the Southern District of New York by a specially constituted three-judge panel convened under 28 United States Code Section 1331, 2282, 2284, 2201 and 2202. The judgment upholds the constitutionality of the challenged statute as it is interpreted and applied to authorize use of federal funds to finance assignment of teaching personnel to perform educational services in religious schools. The complaint sought both declaratory and injunctive relief on the ground that the statute, so interpreted and applied, violated the Establishment Clause of the First Amendment to the United States Constitution.

The final judgment dismissing the complaint herein on the merits was made and entered on the 30th day of April,

1980. Notice of Appeal therefrom (Appendix "C" hereto) was duly served and filed on May 27, 1980.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final judgment above cited pursuant to the terms of 28 United States Code, Sec. 1253.

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); and *Meek v. Pittenger*, 421 U.S. 349 (1975).

Statute Involved

Title I, Section 205 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e-1(a) as amended), reads in the relevant part as follows:

> **§ 241 e. Application for grants by local agency—Approval by State agency; considerations**
>
> (a) A local educational agency may receive a grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)—. . . (2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special

educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment); in which such children can participate.

Question Presented

The question presented on this appeal is a narrow one. The present suit does not challenge the constitutionality of the statute as a whole. The issue before the Court on this appeal is the constitutionality under the First Amendment of the statute insofar as it mandates or authorizes the expenditure of federal funds to finance the assignment of teachers and other personnel to perform educational services in religious schools during regular school hours.

Statement of the Case

Plaintiffs commenced this action on February 25, 1976 for judgment to declare unconstitutional and enjoin enforcement of the challenged statute insofar as it authorizes use of federal funds to finance the assignment of teachers and other personnel performing educational functions to render educational services within religious schools during regular school hours. The plaintiffs herein do not necessarily concede the constitutionality of the statute insofar as it authorizes financing of non-educational services, nor of educational services performed after regular school hours, nor of educational services rendered in respect to which, though not given on religious school premises, are in fact and reality limited to pupils attending religious schools. Plaintiffs, however, suggest that these questions are not

raised in the complaint herein nor asserted at the trial in the District Court and therefore need not be passed upon by this Court.

Motions to intervene were made by parents of pupils attending, respectively, Catholic and Jewish religious schools. Plaintiffs did not contest intervention, and their motions were accordingly granted.

A trial was held in the District Court in May, 1979, and the Court unanimously decided in favor of the defendants and accordingly ordered dismissal of the complaint. Judgment for the defendants on the merits was entered on April 30, 1980.

The Question Is Substantial

As we have noted, the constitutional challenge presented in this case is a narrow one. It is limited to a particular practice, under Title I, Section 205 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e-1(a), as amended), pursuant to which local educational agencies assign teachers and other personnel paid for by federal funds to religious schools in order to perform educational services therein during regular school hours. This issue, we submit, was decided in *Public Funds for Public Schools* v. *Marburger,* 358 F. Supp. 29 (D.N.J.) *affirmed* 417 U.S. 961 (1974) and *Meek* v. *Pittenger,* 421 U.S. 349 (1975).

There are many programs within the meaning of Title I of the Act that can practicably be instituted by local educational agencies which would qualify them for the receipt of federal funds under the Act without violating the provisions

of the Federal Constitution. Among these are programs to provide pupils with health and dental benefits in public and religious schools, programs providing breakfast and lunch to pupils in all schools, and guidance programs and programs for special instruction in courses such as reading, arithmetic, music and art if conducted on publicly owned premises after regular school hours and open equally and without segregation on the basis of religion or race to children registered in public and religious schools.

What we contend in this case is only that the First Amendment forbids the financing of educational services within religious schools during regular school hours. Hence, a judicial determination upholding our contention need not deprive the religious schools or the pupils attending them of any federal funds.

Twice this Court has faced the specific constitutional question raised in this case, and in both instances it has ruled the challenged statute unconstitutional on its face.

Public Funds for Public Schools v. *Marburger, supra,* involved a New Jersey statute fashioned after the federal statute challenged herein and like it, providing for the financing out of tax-raised funds of auxiliary services identical to those involved in the present case. The United States District Court for New Jersey held the statute unconstitutional on its face and granted judgment for the plaintiffs on motion without trial. This Court affirmed that judgment.

Meek v. *Pittenger, supra,* involved a Pennsylvania statute also fashioned after the federal statute in issue here,

providing state funding of auxiliary services, such as those involved in the present case, offered in religious elementary and secondary schools. A trial was held at which the plaintiffs presented no substantive evidence but relied upon the facial unconstitutionality of the challenged statute. The defendants, the State of Pennsylvania and intervening parents of pupils in religious schools, presented, over the plaintiffs' objection, an elaborate case of factual evidence. The trial court, with one judge dissenting, relied upon the trial evidence and upheld the constitutionality of the statute. The Supreme Court reversed and held the statute unconstitutional on its face.

The only difference between *Marburger* and *Meek* on the one hand and the present case on the other is that the present case involves a federal statute and the former cases involved State statutes. It is, however, inconceivable that a practice violative of the Establishment Clause of the First Amendment as made applicable to the States by the Fourteenth should be held constitutional when applied to the federal government. Aside from the maxim that a river cannot rise higher than its source, we note that the Tenth Amendment reserves to the States all powers not delegated to the Federal Government or prohibited by the Constitution to the States. Since education is traditionally primarily a State rather than a federal power, it would seem that the States should have greater rather than less latitude in how tax-raised funds may constitutionally be applied than should the Federal Government. See *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), *judgment modified*, 422 U.S. 1004 (1975). In any event, we are not aware of any decision of the Supreme Court or of any other court holding that a practice violative of the Establishment Clause as made ap-

plicable to the States by the Fourteenth Amendment can be upheld when adopted by the Federal Government itself.

At the opening of the hearing, counsel for the plaintiffs informed the court that he had been unable to obtain evidence to establish as a factual matter that practices within the City of New York violated the Constitution and conceded that the defendant, Superintendent of Schools in the City of New York was entitled to judgment dismissing the complaint as to him.[1] (Prior to the trial, plaintiffs' counsel offered to discontinue the suit as against the Superintendent, but, for unexplained reasons, the offer was refused.) On the basis of this concession, counsel objected on the grounds of irrelevancy to the introduction of any evidence in respect to practices within the City of New York. (Transcript of Trial Testimony, p. 68.) The objection was apparently overruled, although the trial record is not entirely clear on this. In any event, the testimony is in the record now before this Court.

At the trial, the defendants offered no testimony or evidence relating to schools other than those within the City of New York. For their part, the plaintiffs presented uncontradicted evidence that the practices challenged in this suit were and still are widespread throughout the United States.

The only witness called by the plaintiffs was Dr. John Ellis of the Department of Health, Education and Welfare,

1. Plaintiffs' counsel stated that he had no doubt that the practices in New York City violated the Establishment Clause but that practical considerations (specifically the cost and difficulty of obtaining as non-hostile witnesses the very public school teachers who voluntarily accepted assignment to teach in religious schools) impelled discontinuance in respect to New York City schools. (Transcript of Trial Testimony, pp. 7-8.)

who testified in lieu of defendants Califano (now Hufstedler) and Boyer. In response to counsel's questions, Dr. Ellis answered in the affirmative in respect to each of the following questions that may be summarized as follows:[2]

Whether the Secretary of Health, Education and Welfare and the Commissioner of Education have construed and applied and continue to construe and apply the Elementary and Secondary Education Act of 1965 as not excluding the providing of Title I funds to finance the assignment of teachers to perform educational services during school hours within schools that for religious reasons segregate the pupils as to sex; impose religious restrictions on admissions; require attendance of pupils at religious activities; require obedience by students to the doctrines and dogmas of a particular faith; require pupils to attend instruction in the theology or doctrines of a particular faith;

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2. At the trial, the following colloquy took place upon objection by the attorney for intervenors to the questions put to Dr. Ellis:

> Mr. Pfeffer: Up to this point, what I am taking, including this, comes from the relevant decision from the United States Supreme Court, and I am using the exact language used by the United States Supreme Court in these cases.
>
> Mr. Williams: That doesn't make it a comprehensible question, though, your Honor.
>
> The Court: You may be taking something out of context, with that thought.
>
> Mr. Pfeffer: I'm certain Mr. Williams and his associates in their briefs would point out very strongly I am taking something out of context. The answer, your Honor, is what I am doing in performance of my obligations, is to ascertain whether the Government of the United States is complying with what plaintiffs deem to be the relevant and binding decisions of the United States Supreme Court, and therefore lest I misword or misinterpret or misconstrue what the Supreme Court said, I am using the exact language of the Supreme Court of the United States. (Transcript of Trial Testimony, p. 54.)

The trial court allowed the testimony.

are an integral part of the religious mission of the church sponsoring it; are an integral part of the religious mission of the church sponsoring it; have as a substantial purpose the inculcation of religious values; impose religious restrictions on faculty appointments; impose religious restriction on what the faculty may teach; maintain, operate and conduct instruction in a religious atmosphere which pervades the school; are located on property proximate to a parish church in order to facilitate access to the church for certain religious exercises; have religious symbols such as crucifixes, paintings and statues in the parish school buildings; make adjustment in daily class schedules to accommodate liturgical observances and recognition of religious holidays; include religious members (such as priests and nuns) whose religious vocations are promoted and encouraged by the parish schools; have majorities of lay teachers in the parish schools who are practicing members of a particular religion and whose religious character, along with that of other teachers, is a critical factor assessed in choosing them for employment in the pa ish schools; impose discipline and dismissal upon teachers who do not achieve or maintain a certain standard of a particular faith or a proper standard of morality consistent with its religious tenets; determine whether discipline or dismissal of a teacher is appropriate in keeping with the religious mission of the schools; engrain and transmit a particular faith to the students in the parish schools not only by instruction but also by the very presence of teachers who exhibit and display firm religious beliefs, consistent with that faith; consider the curriculum, and the religious and moral conduct of faculty members, as crucial to the inculcation of religious values in the students and the realization by the parish schools of the religious mission of a particular church; and require that religious

truths and values pervade each subject instructed in the schools. (Transcript of Trial Testimony, pp. 59-60.)

On the examination of Dr. Ellis, trial counsel also asked if HEW continued to allot Title I funds in respect to the same religious schools in New Jersey and Pennsylvania which were involved in *Marburger* and *Pittenger*. Objection taken to the question was sustained by the trial court for some reason not fully clear to plaintiffs' counsel. The latter made a tender of proof and stated that if the question were allowed the answer would be in the affirmative. (Transcript of Trial Testimony, pp. 61-65.)

We respectfully submit that the affirmative answer as to any one of these questions would be sufficient to require reversal in the present case. We need make no further comment as to the significance of the affirmative answers to all of them.

We do not herein comment upon any evidence presented by the defendants with one exception. That exception relates to the testimony, presented by all the defendants' witnesses, that from time to time representatives of the Board of Education visited the religious schools, never found any religious symbols in the rooms which they visited and at no time found any of Title I subsidized teachers engaged in the teaching of religion.

Quite obviously, the City of New York could not constitutionally receive tax-raised funds if any part of these funds were used to subsidize or otherwise financially aid religious teaching in the schools. Under the decisions heretofore cited, funding would be unconstitutional unless the government made certain that no part of the funds were

used for religious purposes and to assure that this was so the Board of Education sent its representatives into the religious schools to witness the teaching therein.

What, however, the trial court apparently did not recognize was that these intrusionary investigatory entrances into the religious schools themselves constituted a violation of the Establishment Clause in that they result in governmental entanglement with religion. *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *New York* v. *Cathedral Academy,* 434 U.S. 125 (1977). As this Court said in the Cathedral Academy case, "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment and it cannot be dismissed by saying it will happen only once." If sending State investigators into religious schools to police teaching therein does not constitute impermissible entanglement of church and state it is difficult to imagine what does. *Walz* v. *Tax Commission,* 397 U.S. 664 (1970); *National Labor Relations Board* v. *Catholic Bishop of Chicago,* —— U.S. ——, 90 S. Ct. 1313 (1979).

Conclusion

For the reasons set forth herein, probable jurisdiction should be noted in the present case.

June 16, 1980

Respectfully submitted,

LEO PFEFFER
Attorney for Appellants

Appendices

APPENDIX A

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 888 (CHT)

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

Plaintiffs,

against

PATRICIA R. HARRIS, Secretary of the United States Department of Health, Education and Welfare, *et al.*,

Defendants,

and

JAMES and BESSIE BOVIS, *et al.*,

Intervenor-Defendants,

and

PHILIP and IDA FENSTER, *et al.*,

Intervenor-Defendants.

Three-Judge Court

Ellsworth A. Van Graafeiland, C.J.
Charles H. Tenney, D.J.
Vincent L. Broderick, D.J.

APPEARANCES

For plaintiffs:

LEO PFEFFER, ESQ.
15 East 84th Street
New York, New York 10028

For defendants Harris and Boyer:

WILLIAM M. TENDY
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

By: MICHAEL H. DOLINGER
Assistant United States Attorney

For defendant Chancellor of the Board of Education of the City of New York:

ALLEN G. SCHWARTZ
Corporation Counsel of the
City of New York
100 Church Street
New York, New York 10007

By: LORNA BADE GOODMAN
MARY TUCKER

For intervenor-defendants Bovis, et al.:

WILLIAMS & CONNOLLY
Hill Building
Washigton, D.C. 20006
By: EDWARD BENNETT WILLIAMS
CHARLES H. WILSON
KEVIN T. BAINE
STEPHEN L. URBANCZYK

For intervenor-defendants Fenster, et al.:

NATIONAL JEWISH COMMISSION ON LAW
AND PUBLIC AFFAIRS
919 Third Avenue
New York, New York 10022
By: DENNIS RAPPS

TENNEY, D.J.

The constitutional prohibition against government aid to parochial schools[1] has provoked considerable litigation resulting in an array of not entirely harmonious judicial decisions.[2] This Establishment Clause challenge to Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as amended, 20 U.S.C. §§ 2701 *et seq.* ("Title I"), was launched over twenty years ago and, at that time, culminated in the landmark decision of *Flast* v. *Cohen*, 392 U.S. 83 (1968). The same day that *Flast* established that a taxpayer had standing to assert this First Amendment claim, the Supreme Court upheld a New York law requiring local public school authorities to lend textbooks free of charge to parochial school students. *Board of Education* v. *Allen*, 392 U.S. 236 (1968). Confronted with this unfavorable precedent and an apparently unsympathetic Court, the opponents of Title I decided to postpone pursuit of their claim. The legal landscape has now changed and the challenge has been renewed. The National Coalition for Public Education and Religious Liberty ("PEARL") has brought this suit against the Secretary of Health, Education and Welfare, the United States Commissioner of Education, and the Chancellor of the New York City Board of Education

1. Throughout this opinion the term "parochial school" will be used interchangeably with "nonpublic" or "private school." While the latter, of course, may be either secular or sectarian, this opinion is concerned solely with nonpublic schools that are affiliated with a particular religious organization or group. For the sake of brevity, therefore, the religious orientation of a nonpublic or private school will generally be presumed.

2. *See Committee for Public Education* v. *Regan*, 48 U.S.L.W. 4168, 4175 (U.S., February 20, 1980) (Stevens, J., dissenting); *Wolman* v. *Walter*, 433 U.S. 229, 251 n.18 (1977); *Wheeler* v. *Barrera*, 417 U.S. 402, 431 (1974) (Douglas, J., dissenting); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 761 n.5 (1973).

to enjoin the allocation and use of Title I funds for the remedial education of parochial school students by public school teachers on the premises of the parochial schools during regular school hours.

Since *Flast* and *Allen* were decided, two developments have occurred that are decisive in the resolution of this lawsuit. First, a series of Supreme Court decisions have clarified in part the precise concerns underlying the First Amendment's prohibition against the establishment of religion. Second, New York City has been running Title I programs for about fourteen years and has accumulated an extensive record of operations that can be examined and evaluated. Upon viewing this record in light of the considerations embodied in the Establishment Clause, this Court has concluded that Title I, as interpreted and applied in New York City, does not violate the First Amendment of the Constitution.

Procedural Background

After this lawsuit was filed, the Court granted motions to intervene as defendants that were made by certain parents of children who attend parochial schools in New York and who receive remedial educational assistance under Title I. A three-judge court was convened to hear and decide the case pursuant to 28 U.S.C. § 2282.[3]

Plaintiffs then moved for summary judgment or, in the alternative, for a prelimiary injunction. Relying on *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J.) (three-

3. This action was commenced by a complaint filed February 25, 1976 and is therefore unaffected by the repeal of the three-judge court provision. Act of August 12, 1976, Pub. L. No. 94-381, § 7, 90 Stat. 1120.

judge court), *aff'd mem.*, 417 U.S. 961 (1974), discussed *infra,* the plaintiffs asserted that the Supreme Court twice "has faced the constitutional question raised in this case, and in both instances it has ruled the challenged statute unconstitutional on its face." Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 2. The Court denied both motions. *National Coalition for Public Education and Religious Liberty* v. *Califano,* 446 F. Supp. 193, 196 (S.D.N.Y. 1978). Not only did the plaintiffs fail to show the threat of irreparable injury that is a prerequisite to preliminary injunctive relief, but, as noted by the Court, an order halting the remedial education program in the middle of the year would work an unwarranted hardship on the defendants and would harm the public interest. *Id.* at 195. The Court also rejected PEARL's summary judgment argument for two reasons.

> First, the plaintiffs' challenge is *not* to this statute on its face: rather, they challenge Title I only "insofar as [it] authorizes the expenditure of federal funds to finance educational services within religious schools during school hours." Notice of Motion ¶ 3. The limited nature of this challenge to a particular application of the statute necessarily demands that this Court be fully informed on the exact manner in which these Title I funds are used, in order both that the Court may understand and evaluate the alleged constitutional improprieties of this use of Title I funds and that the Court may shape a suitable injunctive order should such improprieties be found.
>
> Second, as the Supreme Court has noted,
>
> > The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the

> Court. Usually it requires a careful evaluation of the facts of the particular case. It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to render a decision on hypothetical facts . . . .
>
> *Wheeler* v. *Barrera*, [417 U.S. 402, 426-27, 94 S. Ct. 2274, 2288] (citations omitted). In evaluating a first amendment challenge, a court must examine, *inter alia*, whether "the statute and *its administration* [avoid] excessive entanglement with religion." *Meek* v. *Pittenger*, *supra*, 421 U.S. at 358, 93 S. Ct. at 1760 (emphasis added). Such an examination is not possible on the current record.

Id. at 196.

An evidentiary hearing was conducted in May 1979. Plaintiffs called only one witness, Dr. John Ellis, Executive Deputy Commissioner for Educational Programs in the United States Office of Education. Plaintiffs' counsel stated that he was seeking to determine how the federal government interprets and administers Title I and proceeded to ask Dr. Ellis a series of primarily hypothetical questions based on prior Supreme Court decisions. Tr. 40-65. Pursuant to an agreement reached at a pretrial conference, the defendants presented the bulk of their case in the form of a narrative summary which was received into evidence. Defendants' Exh. T. This summary synthesized numerous affidavits, Defendants' Exh. U, Tabs A-1 to A-58, and documentary evidence, Defendants' Exhs. A-S, which described the operation of New York City's Title I program in nonpublic schools. The defendants also called seven witnesses who were teachers or administrators in the program.

At the start of the evidentiary hearing, plaintiffs' counsel stated that PEARL had no evidence showing that New

York City's Title I program was unconstitutional. Tr. 8. Counsel explained that PEARL had sought to discontinue the suit against the City because "proof of such a [constitutional] violation and the financing of a trial record is beyond our means." *Id.* at 718. The City, however, had rejected PEARL's discontinuance offer.[4] The plaintiffs therefore asked the Court to enter judgment in favor of the City and allow the case to go forward against the two federal officials. The Court did not grant the request and plaintiffs conceded that "there is no violation in respect to any school within the City of New York and we ask no relief against the City of New York." *Id.* at 8.

Towards the end of the hearing, plaintiffs' counsel stated that "[o]ur basic premise is the statute on its face as construed by the Commissioner of Education is unconstitutional irrespective what happens in any school anywhere in the United States." *Id.* at 159. He then agreed with the Court's characterization of PEARL's argument as being "[n]ot that the statute itself is unconstitutional but [that it] is being unconstitutionally interpreted and applied." *Id.* at 60. Plaintiffs' counsel reaffirmed this position at the post-trial oral argument before the three-judge panel, P-Tr. at 17,[5] and reiterated his view that the case was unaffected by the lack of proof that New York City's Title I program violated the Constitution. *Id.* at 11.

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4. Counsel for New York City stated at the hearing that the City opposed the plaintiffs' "concession of judgment in this case and . . . if we had not been named as a party in this case we would move to intervene." Tr. 37-38. In describing the City's interest in seeing the program continued in its present form, counsel remarked that "[i]t is not necessary for me to recount the cost to the City of educational deprivation." *Id.* at 38.

5. "P-Tr." signifies the transcropt of the post-trial oral argument held before this three-judge Court on December 14, 1979.

The Court rejects plaintiffs' contention that "the issue in this case is not what is actually done; the issue in this case is what is authorized by the law which we are challenging." *Id.* at 11-12. This assertion is directly contradicted by the admonition of the *Wheeler* Court, quoted above, that a federal court must not issue decisions based on hypothetical situations. *Wheeler* v. *Barrera, supra,* 417 U.S. at 427. In *Wheeler,* the Supreme Court specifically declined to rule on the constitutionality of a Title I program that provided remedial services on the premises of parochial schools because it would be "wholly inappropriate" to render an opinion "when no specific plan is before us." *Id.* at 426. Obviously, it would be highly inappropriate for this Court to reject the exhaustive evidence that has been presented on New York City's Title I program and to resolve this suit on the basis of the plaintiffs' evidence about what *could* happen under the law. Accordingly, the factual summary and legal analysis that follows relies on the undisputed evidence submitted on the implementation of Title I in New York City schools. The Court's constitutional ruling is, of course, confined to the fact situation specifically presented here.

Factual Background

Title I

Title I was enacted in 1965 to provide federal funding for compensatory educational programs that are administered by local public educational agencies and are directed to educationally deprived children in low-income areas. Recognizing the significant correlation between poverty and learning deficiencies, Congress "declare[d] it to be the policy of the United States to provide financial assistance

. . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. § 2071; *see* S. Rep. No. 146, 89th Congress, 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1446, 1450. The Act provides for annual congressional appropriations for programs proposed by local educational agencies ("LEA") and approved by state educational agencies. 20 U.S.C. § 2731. All programs are administered solely by the LEA in the particular area and are staffed entirely with the LEA's employees. 20 U.S.C. § 2734(m); 45 C.F.R. §§ 116.42, 116a.23(f). In order to be eligible for Title I funds, a program must satisfy certain statutory criteria that are designed to assure that the Act's purposes are advanced. For example, Title I funds may be provided only to children who meet the dual eligibility requirement of (1) educational deprivation, defined as below age-level performance and (2) residence in an area designated by the LEA, in accordance with Title I regulations, as having a high concentration of children from low-income families. *Id.* §§ 2722, 2732-2734. Federal financing is available only for programs that will supplement, rather than supplant, non-federally funded programs that would have been available in the absence of Title I funds. *Id.* §§ 2734(f), 2736(c).

Participation in Title I programs is not limited to children enrolled in public schools. The Act provides:

> To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency

> shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate. . . . Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be *equal* (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

20 U.S.C. § 2740(a) (emphasis added). Title I regulations require that each LEA provide services designed to meet the needs of educationally deprived children who attend private schools. 45 C.F.R. § 116a.23. These children must be given "genuine opportunities to participate," and the types of services to be provided shall be determined "on a basis comparable to that used in providing for the participation of public school children." *Id.*

As noted by the Supreme Court, Congress anticipated that "one of the options open to the local agency in designing a suitable program for private school children was the provision of on-the-premises instruction." *Wheeler* v. *Barrera, supra,* 417 U.S. at 422; *see* S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1446, 1457; 111 Cong. Rec. 5747-48 (1965) (remarks of Congressmen Goodell, Carey and Perkins). Federal and local officials administering the statute have adhered to the view that services directed to nonpublic school children may be provided on the premises of the nonpublic institution. *Wheeler* v. *Barrera, supra,* 417 U.S. at 421-23; 45 C.F.R. § 116a.23(f); Affidavit of Gene-

vieve Dane, Program Operations Branch Chief in HEW's Division of Education for Disadvantaged, sworn to April 20, 1979 ("Dane Aff."), ¶ 11; Affidavit of Lawrence F. Larkin, Director of the Bureau of Nonpublic School Reimbursable Services for the New York City Board of Education, sworn to April 17, 1979 ("Larkin Aff."), ¶ 9.

Title I regulations impose restrictions on the services provided on the premises of the nonpublic schools to assure that the programs remain secular both in content and setting. Public school personnel may provide instruction on nonpublic school premises only to the extent necessary to make such special services available to those educationally deprived children for whom the Title I program was designed. 45 C.F.R. § 116a.23(f). These services may be provided to eligible students only if they are not otherwise provided by the nonpublic school. *Id.* Title I funds may not be used to pay the salaries of private school teachers or employees, except for services performed outside their regular hours of duty under public supervision and control. *Id.* The LEA must maintain exclusive direction and control over all Title I services and funds, wherever provided; no public funds can be disbursed to the schools. *Id.* § 116.42. If any equipment or materials are used in a private school's Title I program, the LEA must maintain title to and physical control of the property and must remove it from the premises if necessary to prevent its being used for any purpose other than the Title I program. *Id.*

If a state or locality fails to comply with Title I requirements pertaining to the approval of local projects, disbursements of funds, or program supervision, the federal government must terminate or suspend Title I funding. 20

U.S.C. § 2836(a); 45 C.F.R. § 116.20. The statute provides, however, that in the event an LEA "is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private and secondary schools as required [by the Act], the Commissioner [of Education] shall waive the requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of [the Act]." 20 U.S.C. § 2740(b)(1). This provision reflects Congress's intent "that state constitutional spending proscriptions not be pre-empted as a condition of accepting federal funds." *Wheeler* v. *Barrera, supra,* 417 U.S. at 417. If the LEA is prohibited by state or local law from providing for the "equitable" participation of private school students in Title I programs, the Commissioner waives the statutory requirement that the state assure such participation and "bypasses" local authorities by arranging for the direct provision of services to eligible private school children. 20 U.S.C. § 2740(b)(2). In Missouri, for example, state law prohibits the provision of Title I services on the premises of nonpublic schools during regular school hours. The United States Office of Education conducted a study in 1976 to determine the manner in which Title I services were being provided to nonpublic school children in four Missouri cities. The study concluded that the services provided at times other than during the normal school day were not comparable in quality, scope, and opportunity for participation to services provided during regular school hours. Affidavit of Joseph J. Vopelak, Acting Chief of the Institutional Services Section, Program Support Branch, in HEW's Division of Education for the Disad-

vantaged, sworn to April 20, 1979 ("Vopelak Aff."), ¶ 14. On the basis of this study, the Commissioner of Education directed that Title I services be provided directly to nonpublic school children in those four districts. *Id.* ¶ 16. Initial determinations of noncomparability have been made with respect to more than fifty other Missouri districts. *Id.*[6]

Title I is the largest single federally funded education program in the United States. During the 1979-1980 school year, services will be provided to approximately 4,800,000 public school children and 200,000 private school children across the nation. Dane Aff. # 3. About 4 percent of the projected budget, or $105,200,000, will be spent on services for private school children. *Id.*

New York City's
Title I Program

The New York City Board of Education ("Board") is responsible for administering the largest program of Title I remedial educational services in the United States.

6. In 1970, parents of children enrolled in nonpublic schools filed a class action alleging that the state had arbitrarily and illegally deprived their children of services to which they were entitled under Title I. While remedial instruction was available in public schools during regular hours, such services were not provided at the parochial schools during the school day. This action resulted in the Supreme Court's decision in *Wheeler* v. *Barrera, supra.* The Court held that "the State is not obligated by Title I to provide on-the-premises instruction" because "comparable," not "identical" programs are mandated by the statute. 402 U.S. at 419. In remanding the case, the Court directed the Missouri Commissioner and Board of Education to develop guidelines ensuring that the Title I comparability standard will be satisfied. As discussed above, the Court declined to rule on the Establishment Clause issue present in the case because no specific plan involving the placement of public school teachers in parochial schools was before the Court. The Court recognized, however, that this option was available to the state in implementing the Court's order on remand. *Id.* at 401.

During the 1978-1979 school year, a total of 404,686 public and nonpublic school students were eligible for Title I services. Larkin Aff. ¶ 34. Of that total, 33,285, or 8.2 percent, were enrolled in nonpublic schools. *Id.* ¶ 35. Because of budgetary and logistical limitations, however, only 13,265 of the eligible nonpublic school students were expected to receive Title I services during that year. *Id.*

In New York City, Title I remedial services are provided directly on the premises of the nonpublic schools during regular school hours. The Board adopted this arrangement only after experimenting with alternative programs. During the first academic year that Title I funds were available, the Board attempted to provide services to private school students after regular school hours on the premises of both the private and public schools. The results of this experiment, however, were quite discouraging. *Id.* ¶ 135. Attendance was poor, students were inattentive, teachers were tired, and parents were concerned about the safety of children leaving school late in the afternoon. *Id.* ¶ 136. A suggested alternative to providing services at the nonpublic schools during the school day was to offer instruction to nonpublic school students at public schools during regular school hours. However, serious questions were raised about the constitutionality, under Article XI of the New York State Constitution, of allowing parochial school students to participate with public school students in programs conducted during regular school hours at the public school. *Id.* ¶ 138(a); Defendants' Exh. L at 3 (Statement by Board on Title I Proposals, August 31, 1966). Upon considering these legal problems and the difficulties created by an after-hours program, the Board decided to establish Title I programs on the premises of nonpublic schools during regular

school hours. Larkin Aff. ¶ 138; Defendants' Exh. L at 3. In adopting this arrangement, the Board was cognizant of the need to maintain the secular integrity of the program. The Board thus stated that it

> will provide the following services for educationally disadvantaged children in non-public schools, on their premises, during the school day: remedial reading, remedial arithmetic, speech therapy, and guidance counselling. The instruction will be given by peripatetic teachers, who will go from one school to another during particular periods; no teacher will be so assigned without his consent. The instruction will not duplicate any of the regular class-room work of the schools involved. Speech improvement instruction, for example, as distinguished from speech therapy (for stammering and other speech impediments), has been eliminated from the proposals as being too close to regular class-room work. Library services for non-public schools have likewise been eliminated as being outside the limited areas of remedial and therapeutic, and as constituting services to institutions more directly than to children.

Defendants' Exh. L at 3.

During the 1977-1978 school year, the Bureau of Nonpublic School Reimbursable Services analyzed the costs that would be incurred if the Title I program for nonpublic school students were to be conducted at sites other than the nonpublic schools. That analysis revealed that annual transportation costs plus other non-instructional expenses would amount to more than $4.2 million which, for the 1977-1978 academic year, was more than 42 percent of the total budget for the private school Title I program. Larkin Aff. ¶¶ 148, 152; Defendants' Exh. N (Analysis of Differences in Costs and Services For On-Premises and Off-Premises

Services To Nonpublic School Pupils During the Regular School Day). The reduction in staff that would be required to meet those additional costs would result in the elimination of services to 5,039 students, 36 percent of those who received Title I services during the 1977-1978 year. Larkin Aff. ¶ 153.

The vast majority of nonpublic school students in New York City who are eligible for and actually receive Title I remedial services attend schools that are affiliated with one of several religious denominations. Board statistics show that approximately 87 percent of these students are enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and Diocese of Brooklyn. *Id.* ¶ 156. An additional 9 percent of the Title I students attend Hebrew Day Schools. *Id.*

Five types of remedial services are provided to nonpublic school children who satisfy Title I eligibility criteria: remedial reading, reading skills instruction, remedial mathematics, English as a second language, and clinical and guidance services. *Id.* at ¶ 39. These services are provided by teachers and support staff who are employed by the Board and subject solely to its supervision and control. *Id.* ¶ 52. Title I teachers generally provide instruction to small groups of students and work with no more than 100 students in a week. *Id.* ¶ 49. The clinical and guidance professionals provide diagnostic testing, consultation and counseling services on an individual basis to children who are having difficulty benefiting from the Title I remedial program. *Id.* ¶¶ 47, 48.

Assignment to a nonpublic school Title I program is purely voluntary, and any teacher may refuse appointment to the program without losing seniority. *Id.* ¶ 54. Paro-

chial school officials have no voice in the initial assignment of a Title I teacher or professional, and there is no known instance of any official or teacher requesting reassignment on religious grounds. *Id.* ¶¶ 56, 57. No inquiry is made into a staff person's religious affiliation or beliefs; therefore this has no bearing on appointment to a nonpublic school. *Id.* ¶ 55. Although the Board maintains no record of religious affiliations, the affidavits of Title I teachers submitted in this action demonstrate that most of them work in parochial schools with religious affiliations different from their own. *Id.* ¶¶ 55, 72. The vast majority of teachers are itinerant and spend less than five days a week at the same nonpublic school. *Id.* ¶ 60.

Each teacher and support professional assigned to a nonpublic school is given a detailed set of written instructions, as well as a series of oral instructions, that delineate his responsibilities and the restrictions imposed on his activities. *Id.* ¶¶ 62, 63. These guidelines emphasize that Title I personnel are independent public school employees who "do not service the entire school" and who have ultimate control over the selection of students for participation in the program. *Id.* ¶¶ 64, 65; Defendants' Exh. F at 130 (Board of Education Orientation Procedures for Nonpublic School Title I Programs). Teachers are instructed that they are not to engage in team teaching or cooperative instructional activities, although they may discuss a student's needs and progress with their counterparts on the parochial school faculty. Larkin Aff. ¶ 68. Title I personnel are also directed not to introduce any religious topics into the curriculum or become involved in the religious aspects of the school. *Id.* ¶ 69. Periodic evaluations and direct program supervision assure that

Title I staff members comply with the Board's guidelines and restrictions. *Id.* ¶¶ 73-85.

Title I teachers in nonpublic schools occupy classrooms that are specifically designated solely for that purpose and that are free from any religious symbols, pictures, or statues. *Id.* ¶¶ 103, 105. None of the materials used in any Title I program has any religious content. *Id.* ¶ 91. The Board retains title to and administrative control over all Title I property, and a comprehensive record keeping and inventory system guards against any diversion or misuse of equipment and materials. *Id.* ¶ 92. Title I teachers are instructed that when materials and supplies are not being used they should be secured, preferably in locked cabinets provided for that purpose. *Id.* ¶ 95. In compliance with the statute and its regulations, no Title I funds are paid to nonpublic schools to finance the salaries of regular classroom teachers, to construct facilities, or to reimburse the schools for any costs they incur in providing space for Title I programs. *Id.* ¶ 99.

The Establishment Clause

Declining to rule on the constitutionality of a "hypothetical" Title I program conducted on the premises of a parochial school, the Supreme Court declared that "the First Amendment implications may vary according to the precise contours of the plan that is formulated." *Wheeler* v. *Barrera, supra,* 417 U.S. at 426. The Court stated, for example, that "a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach

special remedial courses a few hours a week." *Id.* The latter fact pattern described in *Wheeler* is now before this Court.

Resolution of this issue requires application of the tripartite Establishment Clause test established by the Supreme Court.

> First, the statute must have a secular legislative purpose. *E.g., Epperson* v. *Arkansas,* 393 U.S. 97. Second, it must have a "primary effect" that neither advances nor inhibits religion. *E.g., School District of Abington Township* v. *Schempp,* 374 U.S. 203. Third, the statute and its administration must avoid excessive government entanglement with religion. *E.g., Walz* v. *Tax Comm'n,* 397 U.S. 664.

Meek v. *Pittenger, supra,* 421 U.S. at 358. Although easily and frequently recited, the test is not a precise formula, for "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman,* 403 U.S. 602, 614 (1970). The Court should not engage in a "legalistic minuet in which precise rules and forms must govern," for "[a] true minuet is a matter of pure form and style, the observance of which is itself the substantive end." *Id.* As directed by the Supreme Court, "[h]ere we examine the form of the relationship for the light that it casts on the substance." *Id.*

1. *Secular Legislative Purpose*

In considering legislative purpose, the Court must look to the statement of intent contained in the legislation itself, or to the legislative history. It must also look to the legitimate government interest in providing assistance to

nonpublic schools and their students. In this regard, it is noteworthy that the Supreme Court has never invalidated an educational aid statute on the express ground that its purpose was the advancement of religion. *See, e.g., Wolman* v. *Walter,* 433 U.S. 229, 236 (1977); *Meek* v. *Pittenger, supra,* 421 U.S. at 363, 368; *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 773 (1973); *Tilton* v. *Richardson,* 403 U.S. 672, 679 (1971); *Lemon* v. *Kurtzman, supra,* 403 U.S. at 613.

The legislative history of Title I clearly demonstrates that the purpose of the statute was to give aid to needy children, regardless of where they attend school. *See* 20 U.S.C. § 2071; S. Rep. No. 146, 89th Congress, 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1446, 1450. The government has a legitimate interest in providing remedial aid to private school students. Plaintiffs do not suggest that the enactment of Title I was motivated by an impermissible congressional purpose or design. Title I clearly serves a secular legislative purpose, and the statute satisfies the first prong of the three-part test.

2. *Primary Effect*

"Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973). The Establishment Clause precedents that guide this Court reflect a clear distinction between programs that provide aid directly to nonpublic parochial school students and those that either in form or substance

provide direct assistance to the parochial schools themselves. This line was first drawn in *Everson* v. *Board of Education,* 330 U.S. 1 (1947), in which the Court upheld the use of public funds to pay the bus fares of parochial school students. This arrangement was part of a general program under which the state paid the bus fares of all students attending public and nonpublic schools. According to the Court, the state contributed no money to the private schools, but merely helped children get to and from whatever school they attended. *Id.* at 17-18. Similar reasoning was employed in *Board of Education* v. *Allen,* 392 U.S. 236 (1968), in upholding the constitutionality of a state statute authorizing textbook loans to children in public and private schools. The Court stated that "no funds or books are furnished to parochial schools and the financial benefit is to parents and children, not to schools." *Id.* at 244. Comparable textbook loan programs were subsequently approved by the Court in *Wolman* v. *Walter, supra,* 433 U.S. at 238, and *Meek* v. *Pittenger, supra,* 421 U.S. at 362. The Court has also affirmed a district court decision that upheld a state statute authorizing financial assistance to a broad class of needy students in public and nonpublic colleges. *Americans United for Separation of Church and State* v. *Blanton,* 433 F. Supp. 97 (M.D. Tenn.), *summarily aff'd,* 434 U.S. 803 (1977). Although the district court discussed Supreme Court decisions drawing constitutional distinctions between higher and lower levels of sectarian education,[7] the court relied primarily on the

7. *Compare Hunt* v. *McNair, supra,* and *Tilton* v. *Richardson, supra, with Levitt* v. *Committee for Public Education, supra,* and *Lemon* v. *Kurtzman, supra.* The Court has consistently found the religiously affiliated institutions in the college aid cases not to be per-

(footnote continued on next page)

"child benefit" principles of *Everson* and *Allen*. Ultimately, the aid program was upheld because "the emphasis . . . [was] on the student rather than the institution, and . . . no one religion [was] favored by the program, nor [were] private or religious institutions favored over public institutions." *Id.* at 104.

Statutes providing aid directly to parochial institutions were struck down in *Committee for Public Education* v. *Nyquist, supra,* and *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973). *Nyquist* involved, in part, a "maintenance and repair" provision authorizing grants to nonpublic schools without effective restrictions on the ways in which the funds could be used. The Court ruled that the inevitable effect of the grants was to "subsidize and advance the religious mission of sectarian schools." 413 U.S. at 780. The statute invalidated in *Levitt* authorized direct payments to private schools for expenses incurred in connection with testing, maintenance of enrollment records, maintenance of pupil health records, and recording of personnel qualifications and characteristics. Holding that the statute had the primary effect of advancing religion, the Court stated that the aid provided for secular functions was not "identifiable and separable" from assistance to sectarian activities. 413 U.S. at 480.

The mere identity of the party receiving government aid is not necessarily dispositive in determining whether a statute primarily advances religion. In *Nyquist* and

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vasively sectarian, while so characterizing parochial elementary and secondary schools. *See* discussion *infra.* The Court has indicated, however, that aid to a pervasively sectarian college may be constitutionally suspect. *Tilton* v. *Richardson, supra,* 403 U.S. at 682. Since *Blanton* involved colleges of this kind, 433 F. Supp. at 100, the court apparently relied on the fact that the aid flowed to the students and not to the institutions.

Sloan v. *Lemon*, 413 U.S. 825 (1973), the Court invalidated state statutes that provided tuition reimbursements and tax relief to parents of parochial school children. The Court looked beyond the formal recipient of the aid and found that its effect was to provide financial support for sectarian institutions. *Id.* at 832. And just as aid purportedly directed to students or parents may be impermissible, assistance provided directed to the institution may survive judicial scrutiny. For example, in *Tilton* v. *Richardson*, 403 U.S. 602 (1971), the Supreme Court rejected a primary effect challenge to a federal statute that authorized direct grants to institutions of higher education for academic facilities. The Act permitted grants to sectarian schools, but only for facilities that would be used for a defined secular purpose, and expressly prohibited the use of the facilities for any religious activities.[8] Similarly, in *Hunt* v. *McNair, supra*, the Court upheld a state statute that provided financial assistance to institutions of higher education engaged in the construction of buildings and facilities. The Court relied, in part, on statutory restrictions prohibiting use of the facilities for religious activities and noted that the Baptist College involved in the case was not a "pervasively sectarian" institution. 413 U.S. at 743-44. The Court has recently upheld a state statute authorizing public funds to reimburse church-sponsored and secular nonpublic schools for expenses incurred in complying with certain state-mandated requirements pertaining to testing, reporting, and record keeping. *Committee for Public Education* v. *Regan*, 48 U.S.L.W. 4168 (U.S., February 20,

8. The Court invalidated, however, a statutory provision that imposed a twenty-year limitation on the federal government's right to recapture a portion of the facility's present value if any of the statutory restrictions were violated. 403 U.S. at 683-84.

1980). In contrast to the statute previously invalidated in *Levitt* v. *Committee for Public Education, supra,* this provision covered only state-prepared tests—not those prepared by the private school teachers—and established an auditing system to monitor the use of state funds. Relying on these distinctions, the Court upheld the statute on the grounds that the nonpublic schools had no control over the tests; the nonpublic school teachers who graded the objective, multiple-choice exams had no control over the results; and the law provided ample safeguards against excessive or misdirected reimbursement. Cases such as *Regan, Hunt,* and *Tilton* reveal that under certain circumstances, the government may furnish funds or services directly to a sectarian institution if their use is effectively restricted to nonreligious functions and activities.

Title I clearly adheres to the child benefit principle established in *Everson* and *Allen.* The student aid program established by the statute is religiously neutral and is potentially available to all needy children regardless of where they attend school. As required by the statute, Title I services are provided "on an equitable basis" to public and private school children. 20 U.S.C. § 2740(b)(2). During 1978, for example, nationwide expenditures for nonpublic school students accounted for only four percent of the total fiscal year appropriation for Title I. Dane Aff. ¶ 3. In New York, about eight percent of Title I funds was budgeted for private school children. Larkin Aff. ¶ 35. Fewer than one-fourth of the nonpublic schools in the City have Title I programs conducted on their premises. *Id.* Services are provided to eligible nonpublic school students on the premises of their schools during regular school hours because that is the location "where the needs of the children

can best be served," 45 C.F.R. § 116a.19(c), and where these students can receive services that are "comparable" to those provided in public schools, *id.* § 116a.23(c).

Unlike the direct institutional aid statutes invalidated in *Nyquist* and *Levitt*, Title I funds and services do not flow to the parochial schools. Nor are the students merely the formal recipients of the aid. The program is therefore not comparable to a tuition reimbursement or tax break offered only to parents of private school students because it does not relieve the schools' financial burdens or supply funds free from use limitations and is not limited to a small class of beneficiaries. *Cf. Sloan* v. *Lemon, supra*, 413 U.S. at 832 (invalidating state-sponsored tuition reimbursement for parents of children in nonpublic schools, regardless of income level, as financial support for religious institution); *Committee for Public Education* v. *Nyquist, supra*, 413 U.S. at 783, 791 (invalidating tuition reimbursement and tax relief for parents of students in nonpublic schools as constituting "a charge made upon the state for the purpose of religious education"). In the words of the Supreme Court, "the legislative aim of Title I was to provide needed assistance to educationally deprived *children* rather than to specific schools." *Wheeler* v. *Barrera, supra*, 417 U.S. at 406 (emphasis in original). In short, neither the statute nor the programs it has engendered constitute a vehicle for advancing religious education.

The parochial schools whose students receive Title I services may reap some incidental benefits from the program. The Supreme Court, however, "has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its resources on religious ends." *Hunt* v. *McNair, supra*, 413 U.S. at 743.

In fact, Title I funds cannot be used for services that would supplant programs that would otherwise have been available in the absence of federal funds. 20 U.S.C. § 2736(c); 45 C.F.R. § 116.40. Statutory regulations also insure that Title I materials and equipment will not be used to benefit the parochial schools where services are provided. 45 C.F.R. § 116.42(a); Larkin Aff. ¶¶ 92-98. The incidental benefits that may inure to a parochial school where Title I services are provided are insufficient to render the statute unconstitutional. *See Hunt* v. *McNair, supra,* 413 U.S. at 742.

Title I's adherence to the child benefit principle does not, however, make the statute automatically immune from a primary effects challenge. Neither *Everson* nor *Allen* provides a "per se immunity" from judicial examination of the "substance" of a government aid program. *Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 781. In subsequent decisions the Court has carefully pointed out the special characteristics of the government assistance provided in those cases.

> In *Everson,* the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. Such services, provided in common to all citizens, are "so separate and so indisputably marked off from the religious function," that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses.

Id. at 781-82 (citations omitted), *quoted in Wolman* v. *Walter, supra,* 433 U.S. at 251 n.18.

The *Wolman* Court upheld the use of public school employees to provide on-premises diagnostic services and off-premises therapeutic services to nonpublic school students. According to the Court, diagnostic services, unlike teaching or counseling, have little or no educational content, are not associated with the school's educational mission, and would not be subject to religious pressure or influence. *Id.* at 244. Because the diagnostician has only limited contact with the student, there is less opportunity for the transmission of religious views. *Id.* The Court acknowledged that the therapist who provides guidance and remedial services may establish a more substantial and long-term relationship with the student through which religious views could be conveyed. *Id.* at 247. Yet the Court concluded that the danger of religious advancement does not arise if the services are provided at religiously neutral locations, for it is "the pervasively sectarian atmosphere of the church-related school" that creates environmental pressures capable of "alter[ing] the [public school employee's] behavior from its normal course." (*Id.*) In the view of the *Wolman* Court, the ideological pressures generated by the pervasive sectarian atmosphere of a religious institution are qualitatively greater, and therefore constitutionally different, than the minimal influence on a teacher's behavior that may result from merely teaching a student enrolled in a parochial school. Furthermore, the nature of the student-teacher interaction and the location where it occurs were apparently more important to the Court than whether the student or the school was the direct recipient of the aid; simple conformity

to the child benefit standard does not assure constitutionality.

The Supreme Court has repeatedly declared that "[w]hether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." *Meek* v. *Pittenger, supra,* 421 U.S. at 370, *quoted in NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 501 (1979).[9] In contrast to *Everson, Allen,* and *Regan,* the case at bar involves government aid in the form of ongoing educational instruction that cannot be screened in advance for ideological content. "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable but a teacher's handling of a subject is not." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 617 (invalidating, in part, state-subsidized salary supplement for nonpublic school teachers who teach only secular courses). And unlike the government-sponsored diagnostic services upheld in *Wolman,* Title I provides continuous remedial instruction that entails more than minimal teacher-student contact.

Title I services are comparable to the off-premises therapeutic and remedial services approved by the *Wolman* Court. Yet in that case, the Court relied on the grounds

9. The Supreme Court's decision in *Meek,* which in part invalidated the provision of "auxiliary services" on the premises of nonpublic schools, is critical to the resolution of the issue in this case. That case is discussed more extensively in section 3, the "excessive entanglement" portion of this Opinion, because the Court ruled on entanglement grounds. 433 U.S. at 369, 372. Of course the *Meek* Court was also concerned about the program's potential for impermissibly advancing religion, *id.* at 370-72, and another section of the statute challenged in *Meek* was invalidated on that ground, *id.* at 363, 366.

that the use of a religiously neutral site negated the danger of religious advancement.

The question before this Court is whether the apparent differences between Title I and the programs upheld in *Everson, Allen, Regan,* and *Wolman* render this statute as applied unconstitutional. The Court concludes that they do not. The determination that Title I as applied does not have a primary effect that advances religion is based, in part, on: the characteristics of the parochial schools where services are provided; the regulations restricting the activities of Title I teachers and the use of Title I materials; and, most importantly, the substantial evidentiary record compiled in this case that demonstrates to the Court's satisfaction that the program has remained free from religious influences and has not promoted the religious mission of the nonpublic schools.

In describing the "primary effect" prohibited by the Establishment Clause, the Supreme Court has referred to aid flowing to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Hunt* v. *McNair, supra,* 413 U.S. at 743. The profile of a "pervasively sectarian school" has been described in several Supreme Court cases. *See, e.g., Meek* v. *Pittenger, supra,* 421 U.S. at 356; *Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 767-68; *Levitt* v. *Committee for Public Education, supra,* 413 U.S. at 476. Typically, such schools:

> (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at

> instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

Meek v. *Pittenger, supra,* 421 U.S. at 356. According to the Court, "the potential for impermissible fostering of religion" arises when public employees perform "important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Id.* at 371-72.

This description of a hypothetical, pervasively sectarian institution was relied upon by plaintiffs' counsel in questioning Dr. Ellis, the Executive Deputy Commissioner for Educational Programs, at the trial in this case. Counsel sought to establish that the federal government interpreted and applied Title I to authorize government assistance to students who attended nonpublic schools that fit the pervasively sectarian profile. Tr. 42-60. As discussed above, this line of questioning missed the mark, for the Court cannot rule on the basis of even well-founded hypotheticals in the absence of evidence concerning a concrete program. In *Tilton* v. *Richardson,* 403 U.S. 672 (1971), the Court upheld direct federal grants to four colleges with religious affiliations. Holding that none was pervasively sectarian, a plurality of the Court stated that "[i]ndividual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess

these characteristics." *Id.* at 682. This Court, therefore, must evaluate Title I with respect to the New York City program on the basis of the evidence presented in this case.

The record before the Court includes uncontroverted evidence from administrators of Catholic and Hebrew Day schools where Title I services are provided that demonstrates that these institutions do not have the characteristics of the pervasively sectarian schools described by the Supreme Court. The evidence shows that these nonpublic schools (1) do not restrict the admission of students on religious grounds, Affidavit of Reverend Monsignor John J. Healy, sworn to March 22, 1979 ("Healy Aff."), ¶¶ 27-30; Affidavit of Reverend Vincent D. Breen, sworn to March 22, 1979 ("Breen Aff."), ¶¶ 20-25; Affidavit of Rose Fogel, sworn to April 16, 1979 ("Fogel Aff."), ¶ 7; Affidavit of Rabbi David Rogoff, sworn to April 15, 1979 ("Rogoff Aff."), ¶ 7; (2) do not restrict the hiring of teachers on religious grounds, Healy Aff. ¶¶ 32-35; Fogel Aff. ¶ 10; Rogoff Aff. ¶ 9; (3) do not attempt to compel their students to accept or obey the doctrines of the sponsoring church or religious organization, Healy Aff. ¶¶ 21-26; Breen Aff. ¶¶ 35-37; Fogel Aff. ¶ 7; Rogoff Aff. ¶ 7; (4) offer separate programs of secular and religious instruction and do not impose religious restrictions on the content of the instruction offered, Healy Aff. ¶¶ 36-47; Breen Aff. ¶¶ 26-29; Fogel Aff. ¶¶ 8, 9; Rogoff Aff. ¶ 8. Furthermore, the numerous affidavits of Title I teachers and professionals show that these public employees do not perceive a "dominant sectarian mission" and have not been subject to religious pressures or influences in the parochial schools in which they work. *See, e.g.*, Affidavit of Gail Meisel, sworn to April 12, 1979, ¶ 23; Affidavit of Susan Seidler, sworn to April 5, 1979, ¶ 19; Affidavit of Carol Almour, sworn to April 5,

1979, ¶ 18; Affidavit of Anna Marie Carrillo, sworn to March 27, 1979, ¶ 19; Affidavit of Fran Levy, sworn to March 27, 1979, ¶ 19. New York City's use of public school teachers on private school premises does not, therefore, create the same degree of potential for religious advancement that the *Meek* Court feared would result from placing public employees in pervasively sectarian institutions. *See Hunt* v. *McNair, supra,* 413 U.S. at 743-44 (rejecting primary effect challenge to state aid to college that could not be deemed pervasively sectarian; although trustees were elected by state Baptist Convention, whose approval was required for certain financial transactions and all charter amendments, no religious restrictions were imposed on faculty membership or student admissions).

The distinctions between the New York City schools where Title I services are provided and the pervasively sectarian schools described in *Meek* and other cases does not, however, ensure that the Title I program will not promote religion. The Supreme Court's opinion in *Wolman* v. *Walter, supra,* demonstrates that even government aid to a religiously affiliated, but not pervasively sectarian, private school can have this unconstitutional effect. The schools involved in *Wolman* did not restrict the admission of students or the hiring of teachers on religious grounds, did not require pupils who were not members of the sponsoring church to attend religion classes, and did not require teachers to teach religious doctrine as part of the secular courses taught in the school. 433 U.S. at 234-35. Yet the *Wolman* Court indicated that these characteristics were not sufficient to distinguish that case from prior decisions. *Id.* at 235 & n.4, 249-51. Furthermore, the Court upheld the provision of remedial and therapeutic services

because "[s]o long as these types of services are offered at *truly religiously neutral locations*, the danger perceived in *Meek* does not arise." *Id.* at 247 (emphasis added). Finally, a provision authorizing the loan to students or their parents of instructional materials and equipment "incapable of diversion to religious use" was invalidated in *Wolman* because, "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." *Id.* at 248-50.

Divorcing the secular function from the sectarian is not impossible with respect to the educational services provided by Title I. The equipment and materials stored at nonpublic schools are used exclusively for Title I instruction and are secured in Title I classrooms when not being used by public school employees. Title I teachers are well aware of the regulations restricting their own activities and the use of Title I materials. The *Wolman* Court rejected the argument that the loan provision should be upheld because materials were loaned to parents and students and not to the private schools. According to the Court, it would "exalt form over substance" to treat this arrangement any differently than a previously invalidated provision authorizing direct loans of materials to the nonpublic schools. *Id.* at 250. In contrast to either of these arrangements, Title I is a true student aid program, not merely a vehicle for channeling assistance to private institutions. Although the Supreme Court has refused to extend to other items the presumption of neutrality applied to textbooks, *id.* at 252 n.18, the evidence presented here demonstrates that Title I materials and equipment are not diverted from their intended use and do not promote any religious activity. In short, the publicly

owned instructional materials do not support the collective educational enterprise of the parochial school.

In *Wolman,* the "religiously neutral locations" where private school students received remedial services were "neither physically nor educationally identified with the functions of the nonpublic school." *Id.* at 246-47, *quoting Wolman* v. *Essex,* 417 F. Supp. 1113, 1123 (S.D. Ohio 1976), *aff'd in part, rev'd in part sub nom. Wolman* v. *Walter, supra.* In New York City, Title I services are provided on the premises of parochial schools, typically in classrooms set aside for that purpose. Although physically unified, secular and sectarian instruction remain educationally distinct. Title I classrooms are free from religious symbols, contain separate materials and equipment, and are run solely by public school employees who are not subject to the supervision of private school administrators. Title I teachers and supervisors develop their own curricula, and no lessons have any religious or ideological content.

In certain respects, this arrangement resembles a situation depicted by Justice Brennan in an opinion concurring with the Court's denial of certiorari in the case of *Nebraska State Board of Education* v. *School District of Hartington,* 188 Neb. 1, 195 N.W.2d 161 (1972), *cert. denied,* 409 U.S. 921 (1972). In *Hartington,* the Nebraska Supreme Court upheld a Title I grant proposal that involved the use of public funds to lease two unused classrooms in a Catholic High School that would be used for remedial education courses for public and private school students. Under the lease, the school district had full and exclusive control over the classrooms and the remedial instruction; no religious objects or pictures remained in the rooms.

Justice Brennan, who is generally not sympathetic to government programs assisting religious institutions,[10] found the plan perfectly acceptable.

> There is not the slightest suggestion that this was a subterfuge to make a subsidy to the parochial school, or anything except an arrangement motivated solely by the lack of space in the public schools. Thus, the school district would have no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses would operate completely independently of that curriculum and of the Catholic school administration. . . . I have heretofore expressed my view that the First Amendment does not render unconstitutional "every vestige, however slight, of cooperation or accommodation between religion and government." *Abington School District* v. *Schempp*, 374 U.S. 203, 294 (1963) (concurring opinion). The accommodation involved in this case would not trespass beyond permissible bounds.

409 U.S. at 925-26. Justice Brennan's remarks are particularly relevant to the case at bar. The abundant evidence presented in this action demonstrates uniform compliance with the extensive Title I regulations establishing a well defined dichotomy between purely secular instruction and activities subject to religious influences. *See generally* Larkin Aff. ¶¶ 85, 98, 105.

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10. For example, Justice Brennan dissented from the Supreme Court's recent opinion upholding the use of public funds to reimburse church-sponsored private schools for expenses incurred in performing various services mandated by the state. *Committee for Public Education* v. *Regan, supra*, 48 U.S.L.W. at 4173 (Blackmun, J., dissenting in an opinion joined by Justices Brennan and Marshall). He also dissented from that portion of the Court's opinion in *Meek* v. *Pittenger, supra*, that upheld the loan of textbooks to nonpublic school children. 421 U.S. at 373 (Brennan, J., dissenting).

This evidentiary record is a critical feature distinguishing this case from prior decisions relied upon by the plaintiffs. The Supreme Court has repeatedly warned that the placement of public school teachers in parochial schools, unlike the provisions of textbooks or school buses, creates a danger that "religious doctrine will become intertwined with secular instruction," *Meek* v. *Pittenger, supra,* 421 U.S. at 370, *quoted in NLRB* v. *Catholic Bishop of Chicago, supra,* 440 U.S. at 501, because the "pressures of the environment might alter [the teachers'] behavior from its normal course," *Wolman* v. *Walter, supra,* 433 U.S. at 247. Even the "diminished probability of impermissible conduct is not sufficient" to ensure constitutionality. *Meek* v. *Pittenger, supra,* 421 U.S. at 371. Yet in these cases where the Court spoke in terms of potential dangers or probabilities, the program or statute at issue was challenged shortly after enactment and evidence concerning its operation was scarce. *See, e.g., Wolman* v. *Walter, supra,* 433 U.S. at 233; *Meek* v. *Pittenger, supra,* 421 U.S. at 352; *Levitt* v. *Committee for Public Education, supra,* 413 U.S. at 474.

New York City has been providing Title I services in nonpublic schools for fourteen years. The evidence presented in this action includes: extensive background information on Title I; an in-depth description of New York City's program; a detailed review of Title I rules and regulations and the ways in which they are enforced; and the testimony and affidavits of federal officials, state officers, school administrators, Title I teachers and supervisors, and parents of children receiving Title I services. The evidence establishes that the result feared in other cases has not materialized in the City's Title I program. The presumption—that the "religious mission" will be advanced by providing educational services on parochial school premises—is not supported by the facts of this case.

The Court will not conjure up hypothetical situations in the face of a fourteen year record. *See Wheeler* v. *Barrera, supra,* 417 U.S. at 401-02. On the basis of all the evidence presented, the Court concludes that the risk of religious advancement has not been realized and New York City's Title I program does not have an unconstitutional primary effect.

3. *Excessive Entanglement*

The Court now turns to the final prong of the tripartite Establishment Clause test. To satisfy this third element, Title I must avoid "excessive entanglement" between the government and religious institutions. While recognizing that some interaction is inevitable, the Supreme Court has sought to prevent the intrusion of either into the realm of the other. As stated by the Court, "[t]he test is inescapably one of degree." *Walz* v. *Tax Comm'n,* 397 U.S. 664, 674 (1970).

The plaintiffs contend that the issue in this case was resolved by the Supreme Court's decision on entanglement grounds in *Meek* v. *Pittenger, supra,* and its summary affirmance of the district court opinion in *Public Funds for Public Schools* v. *Marburger, supra.*[11] The defendants, in

11. In *Public Funds for Public Schools* v. *Marburger,* 358 F. Supp. 29 (D.N.J. 1973), *summarily aff'd,* 417 U.S. 961 (1974), the district court invalidated two provisions of a state statute that: (1) authorized funds for reimbursing nonpublic school students and their parents for the cost of secular textbooks and supplies; and (2) provided funds to the nonpublic schools to acquire secular supplies, equipment, and auxiliary services. The court found that both provisions had the unconstitutional effect of advancing religion and created the potential for excessive entanglement. *Id.* at 36-42.

In *Meek,* the Court characterized its affirmance of *Marburger* as "a decision on the merits as to the constitutionality of New Jersey's auxiliary-services program [that] is entitled to precedential weight." 421 U.S. at 370 n.20. Because the Supreme Court's opinion in *Meek* is substantially similar to that of the district court in *Marburger,* this Court has focused on the *Meek* decision.

turn, assert that "[t]he central issue in this case is whether an on-premises Title I program gives rise to the same excessive administrative and political entanglement that doomed the auxiliary services program in Meek." Post-Trial Brief of Intervenor-Defendants James and Bessie Bovis at 39. Although this characterization of the case unduly slights the primary effect issue left open in *Meek*, 421 U.S. at 369, the question of excessive entanglement is pervasive and, of course, potentially dispositive.

The *Meek* Court (1) upheld a statutory provision authorizing the loan of textbooks to public and nonpublic school children; (2) invalidated the loan of instructional materials and equipment directly to the nonpublic schools; and (3) struck down the use of public school employees to provide auxiliary services to nonpublic school children on the premises of the nonpublic school. Some of the on-premises auxiliary services prohibited in *Meek*, such as remedial instruction and counseling, are comparable to the Title I services challenged here. The Court expressly declined to decide whether the provision of these services had the "unconstitutional primary effect of advancing religion," although it invalidated the loan of instructional material on that ground. 421 U.S. at 363, 369. Instead, the Court held that "[t]he prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state." *Id.* at 370, *citing Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 619. In the Court's view, to be certain that auxiliary teachers remain religiously neutral, the state would have to restrict their activities and then "engage in some form of continuing surveillance to ensure that those restrictions were being followed." *Id.* at 372. In addition to this "administrative entangle-

ment," the Court found "a serious potential for divisive conflict over the issue of aid to religion—'entanglement in the broader sense of continuing political strife.'" *Id.*, *quoting Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 794. According to the Court, the recurrent nature of the appropriations process and the repeated confrontations between proponents and opponents of the auxiliary-services program provided successive opportunities for political fragmentation along religious lines.

> This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that [the statute] violates the constitutional prohibition against laws "respecting an establishment of religion."

Id.[12]

To determine whether Title I creates excessive entanglement between government and religion, this Court must examine "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the relationship between the government and the religious authority." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 615. This inquiry reveals that Title I does not suffer from

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12. The Court's decision to rely upon a combination of the two forms of entanglement may reflect its belief that the use of publicly employed teachers mitigated the danger of administrative entanglement. In fact, the *Meek* Court expressly recognized that the potential for "fostering of religion" is "somewhat reduced" under these circumstances. 421 U.S. at 372. In *Lemon* v. *Kurtzman*, *supra*, the first case decided on entanglement grounds, the Court invalidated statutes that authorized salary subsidies for parochial school teachers who were obviously subject to the pervasively sectarian atmosphere of the schools. Since the teachers in *Meek* were public employees, they were presumably less susceptible to such influences. Arguably, the risk of administrative entanglement alone would have been an insufficient ground to invalidate the statute.

the same infirmities that doomed the auxiliary services program in *Meek*.

First, the true beneficiaries of Title I are educationally deprived children, not the parochial schools that they attend. See section 2 *supra*. The "character" of these institutions is still relevant, however, because the program provides some incidental benefits to the schools and results in some contact between school officials and Title I personnel. In ruling that the auxiliary services program created excessive entanglement, the *Meek* Court relied in part on its determination that services were provided in schools with a "dominant sectarian mission . . . in which an atmosphere dedicated to the advancement of religion is constantly maintained." *Id.* at 371. Similarly, in striking down state subsidies for parochial school teachers' salaries in *Lemon* v. *Kurtzman, supra,* the Court emphasized the pervasively sectarian nature of the schools involved. 410 U.S. at 615-20. According to the Court, such schools create a danger that religious doctrine will permeate secular instruction and constant surveillance would be necessary to insure that teachers do not engage in the impermissible fostering of religion. 421 U.S. at 370, 372; 403 U.S. at 619. As described above, the typical nonpublic school where Title I services are provided in New York does not fit the Supreme Court's profile of a pervasively sectarian institution. Nor do the Title I personnel assigned to nonpublic schools perceive a dominant sectarian mission or atmosphere in the schools in which they teach. See section 2 *supra*.

This Court recognizes that the danger of religious advancement may be present in a parochial school that is not pervasively sectarian. *See Wolman* v. *Walter, supra,* 433 U.S. at 235 & n.4, 249-51, and discussion in section 2 *supra*.

Yet the Supreme Court's emphasis on the characteristics of pervasively sectarian institutions indicates that such schools enhance the danger that religious views will be fostered. Accordingly, to the extent that this risk is minimized in New York City's nonpublic schools, which are not pervasively sectarian, the need for continuous surveillance to guard against this danger is correspondingly reduced.

Second, the nature of the aid provided by Title I and the structure of New York City's program militates against church-state entanglement. In contrast to *Lemon* and other cases, no Title I funds are disbursed to nonpublic schools or their employees. Like *Meek,* however, public school employees do provide services on the premises of the nonpublic schools. Yet in *Meek,* not only were the schools pervasively sectarian, but the record provided little or no information on how the publicly employed teachers performed their services or were supervised. *See Meek* v. *Pittenger,* 374 F. Supp. 639, 656-57 (E.D. Pa. 1974), *aff'd in part, rev'd in part,* 421 U.S. 349 (1975). The Supreme Court thus held that the district court "erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." 421 U.S. at 349. This Court, however, need not rely solely on the good faith of Title I teachers and supervisors. While the district court in *Meek* stated that "[t]here is no evidence whatsoever that the presence of the therapists in the schools *will* involve them in the religious missions of the schools," 374 F. Supp. at 657 (emphasis added) the affirmative evidence before this Court establishes that Title I personnel *have not* fostered religious views or advanced religious activities. The record here includes a detailed description of how the City's Title I program has operated

over a long period of time. Furthermore, the undisputed testimony of numerous Title I personnel demonstrates that they strictly adhere to the regulations restricting their own activities and the use of materials, and that they view their role as independent of the nonpublic schools' instructional program. *See, e.g.*, Affidavit of Ilene Baron, sworn to April 5, 1979, ¶¶ 7, 8; Affidavit of Elizabeth Krywucki, sworn to April 5, 19[illegible], ¶¶ 8, 9; Affidavit of Marilyn Lefkowitz, sworn to April 5, 1979, ¶¶ 7, 8; Affidavit of Lenore Haber, sworn to April 5, 1979, ¶¶ 7, 8. In short, because the aid provided under Title I does not result in an "impermissible fostering of religion," the "continuing surveillance" deemed necessary in *Meek* is not required to guard against the advancement of religious views or pursuits.

The relationship between the government and religious authorities is the third factor that must be examined to determine whether Title I creates excessive administrative entanglement. Two different types of administrative relationships arise out of New York City's nonpublic school Title I program: (1) supervision of Title I teachers and professionals by Title I and other public administrators; and (2) routine administrative contact between Title I personnel and nonpublic school administrators.

The first relationship—the supervision of public employees by other public officials—does not directly involve any interaction between the government and the religious institutions. Yet this case involves public supervision on the premises of the parochial schools, an arrangement that the *Meek* Court considered excessively entangled. *See* 421 U.S. at 370-72. *Meek*, however, does not govern the situation here. The Title I classrooms in which teaching and supervision generally occur are free from religious influ-

ences and are distinct from the facilities used by the nonpublic school for regular instructional activities. In the words of Lawrence Larkin, who supervises the City's Title I program for nonpublic schools:

> the operation of the Title I program in the nonpublic schools is similar in all material respects to the public school Title I program. In particular, I view the nonpublic school Title I classroom as a school within a school, unaffected by the fact that the nonpublic school in which it is situated is sponsored by or affiliated with a religious denomination.

Larkin Aff. ¶ 107. To the extent that the Title I facility can be considered a public school classroom in a nonpublic school, this program is comparable to the arrangement approved in *Wolman*. As stated by the *Wolman* Court, "[i]t can hardly be said that the [public] supervision of public employees performing public functions on public property creates an excessive entanglement between church and state." 433 U.S. at 248.[13] Furthermore, Title I super-

13. The intervenor-defendants point out that if New York City leased the Title I classrooms from the nonpublic schools, the arrangement would be comparable to that upheld in *Nebraska State Board of Education* v. *School District of Hartington, supra.* These defendants thus argue that

> [i]f such lease arrangements existed, the New York City nonpublic school Title I program would presumably be constitutional under the Court's analysis in *Wolman* as well as Justice Brennan's analysis in *Nebraska State Board of Education* v. *School District of Hartington*, 195 N.W.2d 161 (Neb.), *cert. den.*, 409 U.S. 921 (1972). *See* pp. 52-53, *infra.* The constitutionality of Title I certainly should not turn on such formal distinctions of real property law. Whether the classrooms are leased by New York City —and thereby become "public property"—would in no way change the fact that those classrooms presently are free of any religious atmosphere and that the instruction that occurs in those classrooms is separate and distinct from the regular classroom instruction in the nonpublic schools.

Post-Trial Brief of Intervenor-Defendants James and Bessie Bovis at 51.

visors maintain a complete separation between Title I activities and the regular programs of the parochial schools. Larkin Aff. ¶ 78. The supervisors have only casual and periodic contact with nonpublic school administrators and little or no contact with nonpublic school teachers when they visit the schools. Affidavit of Roberta Spiegelman, sworn to April 5, 1979, ¶¶ 19, 20; Affidavit of Lucille Stovall, sworn to April 5, 1979, ¶¶ 13, 14. This Court thus disagrees with the plaintiffs' unsupported charge that such supervision constitutes "intrusionary investigatory entrances into the religious schools." Plaintiffs' Trial Memorandum of Law at 10. The supervisor reviews and evaluates only the performance of the Title I teacher in the Title I classroom; neither the parochial school nor its instructional program is subject to public examination. The occasional visits made by Title I supervisors and coordinators do not, therefore, give rise to excessive entanglement.

The routine administrative contacts that occur between Title I personnel and nonpublic school administrators fall into three basic categories: (1) disseminating information about Title I to the administrators; (2) processing requests for services; and (3) resolving scheduling problems and other questions concerning the implementation of the program. Larkin Aff. ¶ 116. These contacts neither give the parochial school officials any control over the program nor involve Title I personnel in the affairs of the parochial schools. *See generally id.* ¶¶ 117-27.

Minor administrative contacts between public employees or officials and religious authorities do not violate the Establishment Clause. *See Wolman* v. *Walter, supra,* 433 U.S. at 246 n.13; *Walz* v. *Tax Comm'n, supra,* 397 U.S. at 674-76. Although the interaction here may be more extensive than in prior cases, it appears to fall within the realm

of permissible government-church contacts. The *Meek* Court feared that the presence of public school teachers in parochial schools "has the potential for provoking controversy between the Commonwealth and religious authorities over the extent of the teachers' responsibilites and the meaning of the legislative and administrative restrictions on the content of their instructions." 421 U.S. at 372 n.22. This potential for controversy has not been realized in New York City's Title I program. The Title I teachers' responsibilities are clearly defined, and the nonpublic school officials understand that they have no control or authority over the program. The record demonstrates that the program's design and implementation have successfully avoided any confrontation between government officials and parochial school administrators. *See, e.g.*, Larkin Aff. ¶¶ 113, 127; Affidavit of Bernice Kagel, sworn to April 5, 1979, ¶ 9; Affidavit of Faith Rubin, sworn to April 5, 1979, ¶ 18; Affidavit of Sister Miriam Blake, sworn to April 3, 1979, ¶ 15; Affidavit of Sister Mary DeSales, sworn to April 3, 1979, ¶¶ 13, 14.[14]

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14. In an opinion recently affirmed by the Supreme Court, a three-judge court in this district stated:

> Although *Wolman* does not expressly renounce *Meek*'s theory that aid to a sectarian school's education activities is *per se* unconstitutional, it does revive the more flexible concept that state aid may be extended to such school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views.

Committee for Public Education v. *Levitt*, 461 F. Supp. 1123, 1127 (S.D.N.Y. 1978), *aff'd sub nom. Committee for Public Education* v. *Regan*, 48 U.S.L.W. 4168 (U.S., February 20, 1980) (footnotes omitted). The court noted that "this certainty must be achieved without an excessive entanglement of the State with the sectarian institution." *Id.* n.6. Applying this "flexible concept," this Court finds that the requisite "degree of certainty" has been established here without excessive administrative entanglement.

Title I is fundamentally different than those educational aid programs that have been found to create "the potential for divisive religious fragmentation in the political arena." *Tilton* v. *Richardson, supra,* 403 U.S. at 688. The state statutes invalidated in *Lemon, Nyquist,* and *Meek* were directed to a narrow class of beneficiaries, nonpublic schools that were predominantly church-related. The Court feared that annual appropriations for such programs and recurrent legislative evaluations would produce political conflict along religious lines. *Meek* v. *Pittenger, supra,* 421 U.S. at 372; *Lemon* v. *Kurtzman, supra,* 403 U.S. at 623. In the Court's view, "the narrowness of the benefited class" is an important factor in measuring the "potential divisiveness" of any legislative enactment. *Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 794.

The nationwide class benefited by Title I includes educationally deprived children in both public and nonpublic schools. Only four percent of the national Title I budget is allocated to nonpublic school students, and fewer than one-fourth of the parochial schools in New York City have Title I services on their premises. Legislative consideration of the statute, as well as annual appropriations, are thus far less likely to give rise to political debates about aid to religion. Indeed, although Congress has appropriated funds for Title I since 1965 and has occasionally amended the statute, no evidence of any "divisive religious fragmentation" has been presented. Furthermore, the proportion of the funds allocated to public and nonpublic school students is determined administratively by the New York City Board of Education pursuant to a formula mandating comparable per pupil expenditures. Larkin Aff. ¶¶ 32-35. The amount of money spent for each public and

nonpublic school student is thus dictated by statutory and regulatory requirements that have not been the subject of continuous political debate. Finally, the Title I advisory councils that have been established pursuant to a statutory directive, 20 U.S.C. § 2735, have helped to defuse any potential for political tension between the public and nonpublic school sectors. Larkin Aff. ¶¶ 113, 114.

In sum, the evidence presented in this case establishes that New York City's Title I program neither creates excessive administrative entanglement nor results in divisive political fragmentation. *Meek* is therefore distinguishable from the case at bar. The Court concludes that Title I satisfies the third criterion of the Establishment Clause test.

Conclusion

The Supreme Court has observed that "[t]he task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one . . . [that] requires a careful evaluation of the facts of the particular case." *Wolman* v. *Walter, supra,* 417 U.S. at 426. Having considered all the evidence presented in this action, this Court concludes that New York City's Title I program does not violate the First Amendment's prohibition against the establishment of religion. The program has a secular purpose and neither advances religion nor creates excessive entanglement between the government and religious authorities. While Title I could conceivably engender a program that did not satisfy Establishment Clause standards, this Court will not rule on the basis of abstract propositions. No constitutional infirmity has been

revealed on the facts of this case. Accordingly, both the statute and the City's program survive judicial scrutiny.

So ordered.

/s/ ELLSWORTH A. VAN GRAAFEILAND, per C.H.T.

Ellsworth A. Van Graafeiland, C.J.

/s/ CHARLES H. TENNEY

Charles H. Tenney, D.J.

/s/ VINCENT L. BRODERICK

Vincent L. Broderick, D.J.

Dated: New York, New York
April 18, 1980

APPENDIX B

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civil 888 (CHT)

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

Plaintiffs,

against

PATRICIA R. HARRIS, Secretary of the United States Department of Health, Education and Welfare, *et al.*,

Defendants,

and

JAMES and BESSIE BOVIS, *et al.*,

Intervenor-Defendants,

and

PHILIP and IDA FENSTER, *et al.*,

Intervenor-Defendants.

National Coalition has brought this suit against the Secretary of H.E.W. et al., to enjoin the allocation and use of Title I of the Elementary & Secondary Education Act of 1965, 79 Stat. 27, as amended 20 U.S.C. sec. 2701 Et Seq ("Title I") funds for the remedial education of parochial school students by public school teachers on the premises of the parochial schools during regular hours. And a three judge court having been convened to hear and decide the

case pursuant to 28 U.S.C. 2282, and plaintiff having moved for summary judgment or in the alternative for preliminary injunction, and the court having concluded that Title I as interpreted and applied in New York City, does not violate the 1st amendment of the Constitution, therefore, it is

ORDERED, ADJUDGED and DECREED: That defendants have judgment herein dismissing the complaint.

Dated: New York, N.Y.
April 30, 1980

RAYMOND F. BURGHARDT
Clerk

APPENDIX C

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 888 CHT

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, JOHN D. BLANKINSHIP, JACK CORBETT, FLORENCE FLAST, JEFFERSON FORDHAM, ANDREW LEE GUNN, HELEN C. HELLER, ARYEH NEIER, JOHN RYOR, HOWARD M. SQUADRON, and JAMES E. WOOD,

Plaintiffs,

against

PATRICIA R. HARRIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE: TERREL H. BELL, UNITED STATES COMMISSIONER OF EDUCATION, and IRVING ANKER, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants,

JAMES BOVIS, BESSIE BOVIS, LENA MCPHATTER, CEPHUS MUMFORD, JACQUELINE MUMFORD, PATRICIA ORLANDO, FRUCTUOSO PEREZ, ELBA PEREZ, NELSON RIVERA, GLORIA RIVERA and ANITA SMITH,

Intervenor-Defendants,

MR. AND MRS. PHILIP FENSTER, MR. AND MRS. PHILIP LEVITZ and MR. AND MRS. L. SWIRDLOW,

Intervenor-Defendants.

Notice is hereby given that the plaintiffs herein appeal to the Supreme Court of the United States from the judgment entered in this action on the 30th day of April, 1980, dismissing the complaint herein on the merits.

This appeal is taken pursuant to 28 U.S.C. § 1253.

May 27, 1980

LEO PFEFFER

Leo Pfeffer
Attorney for Plaintiffs

Raymond F. Burghardt, Clerk
U.S. District Court
Southern District of New York

Supreme Court, U. S.
FILED
JUL 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-2044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *ET AL.*,
Appellants,

v.

SHIRLEY M. HUFSTEDLER, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *ET AL.*,
Appellees,

AND

JAMES BOVIS, *ET AL.*,
Intervenor-Appellees,

AND

MR. AND MRS. PHILIP FENSTER, *ET AL.*,
Intervenor-Appellees.

On Appeal From A Three-Judge United States District Court For The Southern District Of New York

MOTION TO AFFIRM

EDWARD BENNETT WILLIAMS
CHARLES H. WILSON
KEVIN T. BAINE
STEPHEN L. URBANCZYK
Hill Building
Washington, D.C. 20006
(202) 331-5000
Attorneys for Intervenor-Appellees James Bovis, et al.

DENNIS RAPPS
71 Broadway
New York, New York 10006
(212) 269-0810
Attorney for Intervenor-Appellees Mr. and Mrs. Philip Fenster, et al.

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STATUTE:

Title I, Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, *et seq.* 3-6

OTHER AUTHORITY:

S. Rep. No. 146, 89th Cong., 1st Sess. (1965) 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2044

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *ET AL.*,

Appellants,

v.

SHIRLEY M. HUFSTEDLER, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *ET AL.*,

Appellees,

AND

JAMES BOVIS, *ET AL.*,

Intervenor-Appellees,

AND

MR. AND MRS. PHILIP FENSTER, *ET AL.*,

Intervenor-Appellees.

On Appeal From A Three-Judge United States District Court For The Southern District Of New York

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, intervenor-appellees move to affirm the judgment of the district court on the ground that the district court faithfully adhered to and applied the constitutional principles set forth in this Court's decisions on the Establishment Clause issues presented by this appeal, thus rendering the question presented so unsubstantial that plenary review by this Court is unnecessary.

QUESTION PRESENTED

Whether, on the basis of the facts in the record of this case, a program established by the New York City Board of Education under Title I of the Elementary and Secondary Education Act of 1965 to provide remedial educational services by public school teachers to educationally and economically deprived nonpublic school students on the premises of nonpublic schools during regular school hours contravenes the Establishment Clause of the First Amendment.

STATEMENT OF THE CASE

A. The Proceedings Below

Appellants, a group of organizations and individual federal taxpayers, challenge the constitutionality of Title I of the Elementary and Secondary Education Act of 1965 ("Title I") to the extent that Title I permits publicly employed teachers paid with federal funds to provide remedial educational services to eligible nonpublic school students on the premises of nonpublic schools during regular school hours. The appellants filed their complaint seeking declaratory and injunctive relief on February 25, 1976.

The defendants named in the complaint were the federal officials responsible for administering Title I and the Chancellor of the New York City Board of Education, which has a program for providing Title I services to nonpublic school students of the type the appellants object to. The district court granted motions to intervene filed by two groups of parents of nonpublic school students who were receiving Title I services under the New York City Board of Education's program.

The district court, after denying the appellants' motions for summary judgment and for a preliminary injunction, set the case for an evidentiary hearing. The appellants elicited testimony from an official of the then Department of Health, Education and Welfare predicated almost entirely on hypothetical questions. The appellees presented the testimony of seven witnesses, all of whom were employees of the New York City Board of Education and were either Title I teachers or administrators of the Title I program for nonpublic school students. The appellees also offered, without objection, the affidavits of 58 persons involved in one way or another with the nonpublic school Title I program and a number of documentary exhibits relating to the administration of that program.

After receiving briefs and hearing oral argument, the court below issued its decision on April 18, 1980, ruling unanimously that the New York City Board of Education's Title I program for nonpublic school students did not contravene the Establishment Clause. The district court entered judgment for the defendants on April 30, 1980, and the appellants filed their notice of appeal with the district court on May 27, 1980.

B. The Challenged Aid Program

1. Overview of Title I

Congress enacted Title I in 1965 to provide federal funding for remedial educational programs that are administered by local public educational agencies ("LEA") for the benefit of educationally disadvantaged children living in low-income areas. See 20 U.S.C. § 2701, *et seq.* Congress acted after finding that "there is a close relationship between conditions of poverty and lack of

educational development and poor academic performance." S. Rep. No. 146, 89th Cong., 1st Sess. 5 (1965). The stated purpose of Title I is to make federal funds available "to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. §2701.

Title I programs are administered solely by the LEA — typically a public board of education — and are staffed entirely by employees of the LEA. 20 U.S.C. §2734(m); 45 C.F.R. §§116.42; 116a.23(f). To be eligible for federal Title I funds, a program must satisfy certain statutory criteria. For example, Title I funds may be used to provide remedial educational services only to children who meet the dual eligibility criteria of educational deprivation and residence in an area designated by the LEA, in accordance with Title I regulations, as having a high concentration of children from low-income families. 20 U.S.C. §§2722, 2732-34. Federal financing is available only for programs that supplement, and do not supplant, non-federally funded programs and that would not have been available in the absence of Title I funds. 20 U.S.C. §§2734 (f), 2736(c).

Congress did not restrict participation in Title I programs to children enrolled in public schools. The Act specifically provides:

> "To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements . . . in which

> such children can participate. . . . Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be *equal* . . . to expenditures for children enrolled in the public schools of the local educational agency." 20 U.S.C. § 2740(a) (emphasis added).

Title I regulations, in implementing the statutory mandate that nonpublic school students be included in the LEA's Title I program, provide that such students must be given "genuine opportunities to participate" and that the type of services provided such students shall be determined "on a basis comparable to that used in providing for the participation of public school students." 45 C.F.R. § 116a.23. Thus, as this Court has expressly acknowledged, "the legislative aim of Title I was to provide needed assistance to educationally deprived *children* rather than to specific schools." *Wheeler* v. *Barrera,* 417 U.S. 402, 406 (1975) (emphasis in original).

In considering the options available for providing Title I remedial services to nonpublic school students, Congress recognized that one option would be to provide the services on the premises of nonpublic schools. See S. Rep. No. 146, *supra,* at 12; 111 Cong. Rec. 4747-48 (1965) (remarks of Congressmen Goodell, Carey and Perkins). This Court has acknowledged that such an option is available to the LEA. *Wheeler* v. *Barrera, supra,* 417 U.S. at 422.

Anticipating that nonpublic school students might receive Title I remedial services on the premises of the schools they attend, Title I regulations restrict that form of services to assure the program remains secular in content and setting. Public school teachers may provide remedial instruction on nonpublic school premises only

to the extent necessary to assure that such services will be available to those educationally deprived students for whom Title I was designed. 45 C.F.R. §116a.23(f). Those services may be provided to eligible students only if they are not otherwise provided by the nonpublic schools. *Id.* Title I funds may not be used to pay the salaries of nonpublic school teachers for work performed during regular school hours. *Id.* The LEA must maintain exclusive direction and control over all Title I services and funds; no Title I funds can be disbursed to nonpublic schools. 45 C.F.R. §116.42. If any equipment or materials are used in connection with a Title I program on nonpublic school premises, the LEA must maintain title to and physical control over the property. *Id.*

Title I is the largest single federally funded education program in the United States. During the 1979-1980 school year, approximately $2.6 billion was allocated for Title I services nationwide. Of that amount, about four percent, or $105 million, was spent on services for nonpublic school students. Of the approximately 5 million students who received Title I services in the 1979-1980 school year, some 200,000 were enrolled in nonpublic schools. J.S., p. 13a.[1]

2. New York City's Title I Program

The New York City Board of Education ("Board") administers the largest program of Title I remedial educational services in the United States. During the 1978-1979 school year,[2] 404,686 public and nonpublic

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[1] Citations to "J.S." in this Motion refer to the Jurisdictional Statement filed by the appellants.

[2] Because the district court conducted the evidentiary hearing in this case on May 10, 1979, the evidence presented concerning New York City's Title I program related principally to how that program operated up to the 1978-1979 school year.

school students were eligible for Title I services, and New York City received approximately $146.8 million in Title I funds. J.S., pp. 13a-14a. Of the eligible students, 33,285, or 8.2 percent, were enrolled in nonpublic schools. J.S., p. 14a. Of the total Title I funds received by New York City, some $12 million, or 8.2 percent of the total, was allocated to the nonpublic school Title I program.[3] Budget limitations made it possible for the Board to provide Title I remedial services to only 13,265 of the 33,285 eligible nonpublic school students. J.S., p. 14a. Those students actually receiving services attended 213 of the 993 nonpublic schools in New York City.[4]

Consistent with the statutory and regulatory scheme of Title I, no public funds are disbursed to nonpublic schools under the New York City program.[5] Rather, the Board itself, using its own employees and its own equipment, provides remedial instructional services directly to nonpublic school students who satisfy Title I eligibility criteria of economic and educational disadvantage. Those services are remedial reading, reading skills instruction, remedial mathematics, English as a second language, and clinical and guidance services.[6] J.S., p. 16a.

The Board provides those remedial services to nonpublic school students by sending its own employees to

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[3] Def. Exh. T, ¶ 43. Exhibit T summarizes the evidence offered by the defendants through documents and affidavits. It was offered and received in evidence pursuant to an agreement among all parties.

[4] Def. Exh. T, ¶ 29.

[5] Def. Exh. T, ¶ 47.

[6] Title I clinical and guidance services are available only to nonpublic school students actually enrolled in Title I instructional programs and are designed to enhance student achievement in those programs. Def. Exh. T, ¶ 50.

the nonpublic schools during regular school hours. The Board decided on that method of providing Title I services to nonpublic school students only after experimenting unsuccessfully with after-hours and off-premises programs. When it decided to provide Title I services on the premises of nonpublic schools during regular school hours, the Board adopted policies and guidelines to assure the secular integrity of the program. J.S., pp. 14a-16a.

Title I remedial instruction is provided to nonpublic school students only by teachers and support staff who are employed by the Board and are subject to supervision and control solely by Board employees. Nonpublic school officials have no voice in the assignments of Title I teachers and professionals to particular nonpublic schools, and there is no known instance of a nonpublic school official or Title I teacher seeking a reassignment on religious grounds. J.S., pp. 16a-17a. The Board makes no inquiry into a Title I teacher's religious affiliation or beliefs, and these factors, thus, have no bearing on the nonpublic schools to which a teacher will be assigned. J.S., p. 17a. While the Board maintains no record of the religious affiliations of its Title I employees, the court below found on the basis of the evidence presented that most of the Title I teachers "work in parochial schools with religious affiliations different from their own." *Id.* The vast majority of Title I teachers are itinerant and spend less than five days a week in the same nonpublic school. *Id.*

Board employees assigned to the nonpublic school Title I program are given detailed written and oral instructions that delineate their responsibilities and restrict their activities. For example, they are told they are independent public school employees who provide

remedial services only to nonpublic school students who meet Title I eligibility requirements. They are also told that they are ultimately responsible for determining which nonpublic school students will receive Title I remedial services. They are instructed that they are not to engage in team teaching or cooperative instructional activities with nonpublic school teachers. In addition, Board employees working in the Title I program are told not to introduce any religious topics into their remedial instruction and not to become involved in any of the religious aspects of the nonpublic schools. J.S., p. 17a.

Responsibility for assuring compliance with those instructions and restrictions rests with Board employees who supervise Title I teachers assigned to nonpublic schools. J.S., pp. 17a-18a. The supervisors carry out that responsibility by making periodic, unannounced visits to Title I classrooms in the nonpublic schools.[7] During those visits, the Title I supervisors do not involve themselves in any way with the instructional or other activities of the nonpublic schools; their concern is solely with the instruction occurring in the Title I classroom. J.S., pp. 43a-44a. Conversely, Title I teachers are not subject to any supervision or control by any official or employee of the nonpublic schools.[8]

Title I remedial instruction is provided in the nonpublic schools in classrooms specifically set aside for such instruction. Those classrooms contain no religious symbols, pictures or statues. J.S., p. 18a. Typically, a Title I classroom has a hand-lettered sign on the door identifying it as a facility reserved for Title I remedial instruction.[9] The court below found that those facilities

[7] Def. Exh. T, ¶¶ 67-70.

[8] Def. Exh. T, ¶ 71.

[9] Def. Exh. T, ¶ 88.

were comparable to the facilities that this Court ruled in *Wolman* v. *Walter*, 433 U.S. 229 (1977), were appropriate for providing publicly funded remedial instruction to nonpublic school students. J.S., pp. 42a-43a.

The court below found that the vast majority of nonpublic school students who receive Title I services attend schools that are affiliated with one of several religious denominations. Approximately 87 percent of those students attend Roman Catholic schools and an additional 9 percent attend Hebrew Day schools. J.S., p. 16a. However, the court below also found, on the basis of uncontroverted evidence, that the "Catholic and Hebrew Day schools where Title I services are provided . . . do not have the characteristics of the pervasively sectarian schools described by the Supreme Court." J.S., p. 31a.

C. The District Court's Opinion

The district court resolved appellants' constitutional challenge to Title I by applying the controlling three-part Establishment Clause test of purpose, primary effect and excessive entanglement. J.S., p. 19a. Two themes underlie the district court's application of that test. First, it grounded its ruling on the uncontroverted evidence presented to it about New York City's Title I program for nonpublic school students, a program that had been in effect for 14 years at the time of its ruling.[10]

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[10] In *Wheeler* v. *Barrera*, *supra*, this Court expressly ruled that it would be "wholly inappropriate" to pass on the constitutionality of a program of Title I services provided to nonpublic school students on the premises of their schools during regular school hours "when no specific plan is before us." 417 U.S. at 426. With that ruling in mind and because the Chancellor of the New York Board of Education was a named defendant, the defendants' evidence consisted almost entirely of facts relating to how New York City provided Title I services to nonpublic school students.

Second, adhering to this Court's admonishment in *Wheeler* v. *Barrera, supra,* 417 U.S. at 426-27, it declined the appellants' invitation to ignore the extensive record developed concerning the New York City program and to decide the case on the basis of hypothetical facts or fears. *E.g.*, J.S., pp. 18a-19a, 36a-37a.

Finding no dispute over the secular purpose of Title I, J.S., pp. 19a-20a, the district court focused its analysis on the primary effect and excessive entanglement branches of the controlling Establishment Clause test. The district court's ruling that Title I does not have a primary effect that either advances or inhibits religion was based on three factors. First, the true beneficiaries of the Title I remedial educational services are educationally and economically deprived students and not the church-affiliated schools they attend. J.S., pp. 20a-26a; *cf. Wheeler* v. *Barrera, supra,* 417 U.S. at 405-06. Second, the church-affiliated schools attended by students receiving Title I services did not have the characteristics of pervasively sectarian schools described in previous decisions of this Court invalidating aid programs. J.S., pp. 29a-32a.[11] Third, the secular educational services provided by Title I teachers were separable and, in fact, totally separated from any religious activities of the church-affiliated schools in which those teachers worked. J.S., pp. 33a-35a. These three factors, and particularly the third, persuaded the district court that Title

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[11] The district court's conclusion that the church-affiliated schools enrolling Title I students in New York City were not pervasively sectarian was based not only on the affidavits of the administrators of the church-affiliated schools, but also on evidence offered by Title I teachers showing that "these public employees do not perceive a 'dominant sectarian mission' and have not been subject to religious pressures or influences in the parochial schools in which they work." J.S., p. 31a.

I, as implemented in New York City for nonpublic school students, did not have an impermissible primary effect. In reaching that conclusion, the district court emphasized that the evidentiary record in this case "is a critical feature distinguishing this case from prior decisions relied upon by the plaintiffs." J.S., p. 36a.

In its entanglement analysis, the district court was confronted by appellants' contention that the decisions in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974), established a per se rule prohibiting publicly funded teachers from providing remedial educational services on the premises of church-affiliated schools during regular school hours. The district court disagreed that *Meek* and *Marburger* established any such per se rule and examined the three elements of the entanglement test — the character and purposes of the schools involved, the nature of the aid program and the resulting administrative relationships — to determine whether New York City's implementation of Title I for nonpublic school students had produced excessive government entanglement with religion. J.S., pp. 39a-40a.

For reasons already noted, the district court found that the church-affiliated schools in this case did not have the pervasively sectarian characteristics this Court attributed to the schools in *Meek*. J.S., pp. 40a-41a. It further concluded that the aid provided nonpublic school students in New York City will not lead to excessive entanglement "because the aid provided under Title I does not result in an 'impermissible fostering of religion,' " and thus "the 'continuing surveillance' deemed necessary in *Meek* is not required to guard against the advancement of religious views or pursuits." J.S., pp. 41a-42a. In reaching that conclusion, the district court contrasted the fears expressed by this

Court, based on an inadequate record, about what *might* happen under the *Meek* program with its express findings, based on an extensive record, that those fears have not materialized in the 14 years the New York City program has operated. *Id.* Finally, the district court ruled that the resulting administrative relationships in the Title I program have not led to excessive entanglement because those relationships give Title I employees no authority over, or involvement in, the educational programs of the nonpublic schools and give the administrators of nonpublic schools no authority over Title I teachers or the content of Title I instruction. J.S., pp. 42a-45a.

Based on these considerations, the district court ruled that the result reached by this Court in *Meek* was not controlling and that the Title I program implemented in New York City for nonpublic school students has not resulted in excessive entanglement between government officials and religious authority. The district court recognized that the *Meek* entanglement ruling was based in part on this Court's fear that the aid programs challenged in *Meek* would offer "opportunities for political fragmentation and division along religious lines" and thus lead to political entanglement. 421 U.S. at 372. The district court ruled that Title I, by its very nature, did not carry a risk of political entanglement and had not in fact generated any "divisive religious fragmentation" since its enactment in 1965. J.S., pp. 45a-47a.

Thus, on the basis of its careful and thorough application of the governing Establishment Clause principles to the extensive evidentiary record developed in this case, the district court ruled unanimously that the Title I program implemented in New York City for nonpublic school students did not contravene the Establishment Clause.

ARGUMENT

The appellants' argument that this case presents a substantial question requiring plenary review by this Court rests on a very basic and simplistic contention — namely, that the decisions in *Meek* v. *Pittenger, supra,* and *Public Funds for Public Schools* v. *Marburger, supra,* established a per se rule prohibiting any use of public funds to pay the salaries of public school employees who provide remedial educational services to nonpublic school students on the premises of their nonpublic schools during regular school hours, irrespective of the circumstances of a particular case. The district court considered and rejected that precise argument, presented to it in virtually the identical language used by the appellants in their Jurisdictional Statement. The district court did so only after analyzing carefully *Meek, Marburger* and related Establishment Clause decisions of this Court and applying the principles of those decisions to the facts of this case. Intervenor-appellees submit that the district court disposed of the appellants' claims in a manner that is in harmony with the controlling decisions of this Court and that no substantial question remains warranting plenary review by this Court.

The appellants' exclusive reliance on the *Meek* and *Marburger* decisions is significant for what it concedes. The remedial educational programs struck down in *Meek* and *Marburger*[12] were invalidated solely on the

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[12] Appellants assert that the auxiliary services program challenged in *Marburger* provided "services identical to those involved in the present case," and that the auxiliary services program challenged in *Meek* was "fashioned after the federal statute at issue here." J.S., p. 6. Intervenor-appellees take issue with the appellants' efforts to equate Title I with the auxiliary services programs invalidated in *Meek* and *Marburger*. The record in this case shows that there are a number of significant differences between Title I and those aux-

ground that they had the potential for fostering excessive government entanglement with religion. In neither case were the challenged aid programs invalidated for having an impermissible legislative purpose[13] or a primary effect that advanced or inhibited religion. Thus, by relying exclusively on the *Meek* and *Marburger* decisions, the appellants concede that Title I is valid in its purpose and primary effect, and they challenge its constitutionality only on the ground that it has led to excessive government entanglement with religion.

The appellants' entanglement argument is factually flawed in two respects. First, that argument is based on appellants' elaborate description of the religious characteristics they attribute to nonpublic schools enrolling students who qualify for Title I services. J.S., pp. 9-11. Indeed, those characteristics go far beyond this Court's description of the "profile" of pervasively sectarian schools described in the *Meek* case. See 421 U.S. at 356. What the appellants fail to acknowledge is that their description of church-affiliated schools is based on the responses of one witness, a government official, to what the district court described as "a series of primarily hypothetical questions." J.S., p. 6a. What the appellants overlook is that the record in this case contains

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liary services programs. For example, Title I services are available only to nonpublic school students who meet the dual statutory eligibility criteria of educational *and* economic disadvantage. There was no requirement in the *Meek* and *Marburger* programs that participating nonpublic school students be economically disadvantaged. The poverty eligibility requirement of Title I has meant, in New York City, that students in fewer than one-fourth of all nonpublic schools receive Title I remedial services. J.S., p. 24a.

[13] Indeed, this Court expressly held in *Meek* that the challenged auxiliary services program had a valid secular legislative purpose. 421 U.S. at 367-68.

not a shred of evidence that any nonpublic school in New York City enrolling Title I students possesses any of the characteristics described in their hypothetical questions. In fact, to the extent that the record describes those nonpublic schools at all, it negates the very characteristics upon which the appellants' entanglement analysis rests. See J.S., pp. 31a-32a.

The district court specifically addressed this aspect of appellants' argument.

> "Counsel [for the plaintiffs] sought to establish that the federal government interpreted and applied Title I to authorize government assistance to students who attended nonpublic schools that fit the pervasively sectarian profile. . . . [T]his line of questioning missed the mark, for the Court cannot rule on the basis of even well-founded hypotheticals in the absence of evidence concerning a concrete program." J.S., p. 30a.

The district court relied for that proposition expressly on this Court's decision in *Tilton* v. *Richardson,* 403 U.S. 672 (1971). The appellants in that case, as do the appellants in this case, sought to shift the Court's attention from the trial court evidence about the schools actually involved in the case to "a 'composite profile' that they have constructed of the 'typical sectarian' institution." 403 U.S. at 682. The plurality expressly rejected that approach.

> "[A]ppellants do not contend that these four institutions fall within this category [of typical sectarian institutions]. Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics. We cannot, however, strike down an Act of Congress on the basis of a hypothetical 'profile.' " *Id.*

Mindful of that admonition, the district court declared that it "must evaluate Title I with respect to the New York City program on the basis of the evidence presented in this case." J.S., p. 31a. In conducting such an analysis, the district court expressly found that the pertinent nonpublic schools in New York City "do not have the characteristics of the pervasively sectarian schools described by the Supreme Court." *Id.*

The second factual flaw in appellants' entanglement analysis is their characterization of certain visits made to nonpublic schools in New York City by Title I supervisors as "intrusionary investigatory entrances into the religious schools" which, appellants claim, necessarily have entangling impact. J.S., p. 12. The district court specifically dealt with that contention, labeling it an "unsupported charge." J.S., p. 44a. The district court noted, based on the record, that "Title I supervisors maintain a complete separation between Title I activities and the regular programs of the parochial schools." J.S., pp. 43a-44a. It also found that the Title I supervisor "reviews and evaluates only the performance of the Title I teacher in the Title I classroom; neither the parochial school nor its instructional program is subject to public examination." J.S., p. 44a. Based on those findings, the district court ruled that "[t]he occasional visits made by Title I supervisors and coordinators [to nonpublic schools] do not . . . give rise to excessive entanglement." *Id.*

The flaws in appellants' factual presentation are compounded by their inattention to the closest precedent of this Court. In focusing, as they do, exclusively on the *Meek* and *Marburger* decisions, the appellants ignore the only decision in which this Court was confronted by a challenge to the constitutionality of providing Title I

remedial services to nonpublic school students on the premises of their schools during regular school hours — *Wheeler* v. *Barrera, supra.* Because there was no program before the Court that provided Title I services to nonpublic school students in that form in *Wheeler,* the Court declined to reach the constitutional question.

> "The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it has required a careful evaluation of the facts of the particular case. . . . It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to render a decision on hypothetical facts. . . ." 417 U.S. at 426-27.

Nevertheless, the Court indicated that a Title I program on the premises of parochial schools would not necessarily be constitutionally doomed.

> "[A] program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week." 417 U.S. at 426.

Wheeler, in short, rejects the notion that any per se rule of invalidity would be applied to a constitutional challenge to Title I and requires that a "specific plan" be examined to resolve such a challenge.

The district court in this case was presented with an extensive and uncontroverted record about a "specific plan" — New York City's program of providing Title I services to nonpublic school students. Under that program, itinerant public school employees, solely under

public supervision and control, are sent into church-affiliated schools to teach special remedial courses for a few hours a week. The district court evaluated New York City's 14-year experience with that specific program in light of this Court's many Establishment Clause decisions on the issue of aid to parochial schools. Its careful and thorough analysis convinced it that New York City's Title I program had not led to excessive government entanglement with religion and had not encroached on any of the values the Establishment Clause was intended to preserve.

In so ruling, the district court neither disregarded nor disturbed this Court's decision in *Meek*.[14] Indeed, the district court specifically found that "*Meek* is . . . distinguishable from the case at bar." J.S., p. 47a. Two principal factors led the district court to that conclusion.

First, it noted that the *Meek* decision was based in part on this Court's determination that the challenged auxiliary services were provided in schools with a "dominant sectarian mission . . . in which an atmosphere dedicated to the advancement of religion is constantly maintained." J.S., p. 40a. The district court specifically found that church-affiliated schools involved in this case did not share the sectarian characteristics attributed to the schools in *Meek*. J.S., pp. 31a-32a. The district court noted that "the typical nonpublic school where Title I services are provided in New York does not fit the Supreme Court's profile of a pervasively sectarian institution. Nor do the Title I personnel assigned to nonpublic schools perceive a dominant sectarian mis-

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[14] While acknowledging the result in *Marburger*, the district court focused its analysis on this Court's reasoning in the *Meek* decision. J.S., p. 37a n.11.

sion or atmosphere in the schools in which they teach." J.S., p. 40a.

Secondly, the district court noted that the auxiliary services program in *Meek* was challenged shortly after its enactment and "evidence about its operation was scarce." J.S., p. 36a. For example, the district court noted that "the record [in *Meek*] provided little or no information on how the publicly employed teachers performed their services or were supervised." J.S., p. 41a. As a result, the district court in *Meek* was forced to rely on the good faith and professionalism of the auxiliary services teachers, a reliance that this Court ruled was misplaced. 421 U.S. 369. Moreover, because there had been very little experience with the auxiliary services program in *Meek* and evidence concerning its operation was sparse, this Court's excessive entanglement ruling was based not on the conclusion that the program had in fact led to impermissible entanglement, but rather on the fear that the program had "[t]he *potential* for impermissible fostering of religion." 421 U.S. at 372 (emphasis added).[15]

The district court in this case did not face the problems created by a newly enacted program and a sparse or inadequate record. The district court noted that "New York City has been providing Title I services in nonpublic schools for fourteen years," and that the uncontroverted evidence presented about that program il-

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[15] This Court's concern for what *might* happen under the *Meek* program was underscored by its further assertion that the program "has the *potential* for provoking controversy between the Commonwealth and religious authorities." 421 U.S. at 372 n.22 (emphasis added).

luminated all aspects of its operation. J.S., p. 36a. For that reason, the district court was able to state:

> "The evidence establishes that the result feared in other cases has not materialized in [New York] City's Title I program. The presumption — that the 'religious mission' will be advanced by providing educational services on parochial school premises — is not supported by the facts of this case." J.S., p. 36a.

Because it had the benefit of an extensive and uncontroverted evidentiary record about a long-established program, the district court did not have to speculate about the potential consequences of the program, as had been true in *Meek*. Rather, the district court was able to conclude that "the affirmative evidence before this Court establishes that Title I personnel *have not* fostered religious views or advanced religious activities." J.S., p. 41a (emphasis in original).

Thus, the district court took full account of the fears of potential entanglement expressed by this Court in *Meek*, searched the uncontroverted record to determine if those fears had materialized in this case and found they had not. As a result, the decision of the district court is wholly consistent with this Court's decision in *Meek*.

Intervenor-appellees submit that this Court can reach a contrary result in this case only if it is willing to disregard the uncontroverted evidentiary record developed below and accept the hypothetical facts and imaginary fears presented by the Jurisdictional Statement. However, this Court has specifically rejected that approach to assessing the constitutionality of Title I. *Wheeler* v. *Barrera, supra*, 417 U.S. at 426-27; see also *Tilton* v. *Richardson, supra*, 403 U.S. at 682. As a consequence, this appeal presents no substantial question warranting plenary review by this Court.

CONCLUSION

For the foregoing reasons, the district court's disposition of the appellants' Establishment Clause claim is in harmony with the controlling precedents of this Court, and no substantial question remains to justify plenary review by this Court. The judgment of the district court should be affirmed.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
CHARLES H. WILSON
KEVIN T. BAINE
STEPHEN L. URBANCZYK
Hill Building
Washington, D.C. 20006
(202) 331-5000

Attorneys for Intervenor-Appellees James Bovis, et al.

DENNIS RAPPS
71 Broadway
New York, New York 10006
(212) 269-0810

Attorney for Intervenor-Appellees Mr. and Mrs. Philip Fenster, et al.

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No. 79-2044

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, et al.,

Appellants,

-against-

SHIRLEY M. HUFSTEDLER, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, et al.,

Appellees,

and

JAMES BOVIS, et al.,

Intervenor-Appellees,

MR. AND MRS. PHILIP FENSTER, et. al.,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK TO AFFIRM

ALLEN G. SCHWARTZ
Corporation Counsel of
the City of New York
Attorney for Appellee
Macchiarola
100 Church Street
New York, New York 10007
(212) 566-2201/2187

LORNA BADE GOODMAN
MARY C. TUCKER
Of Counsel.

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Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK TO AFFIRM

Appellee Frank J. Macchiarola, Chancellor of the Board of Education of the City of New York, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves to affirm the judgment of the three-

judge district court for the Southern District of New York. Appellee moves on the ground that since constitutional adjudication of the Establishment Clause question presented herein depended upon a careful evaluation of the facts of this particular case, the unanimous three-judge court's finding of constitutionality based on an extensive uncontradicted record warrants an affirmance by this Court.

QUESTION PRESENTED

Whether the use of federal funds to provide remedial educational services to economically and educationally deprived children on the premises of nonpublic schools during school hours violates the Establishment Clause of the Constitution.

STATEMENT

This is a direct appeal from the final judgment entered on April 30, 1980, by a district court of three judges convened pursuant to 28 U.S.C. §2282, dismissing appellants' complaint. Appellants seek to enjoin the allocation of funds provided to New York City under Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, as amended, 20 U.S.C. §2701, et seq ("Title I"). After a trial on April 10, 1979, at which appellees presented extensive, uncontradicted documentary evidence describing New York City's Title I nonpublic school program and live testimony by program teachers and administrators, the three-judge district court unanimously held that based on the specific fact situation presented, "Title I, as interpreted and applied in New York City, does not vio-

late the First Amendment of the Constitution." J.S. App. 4a.

In its opinion, the court outlined Title I's statutory framework and its implementation. Title I was enacted in 1965 in recognition of the significant correlation between poverty and learning deficiencies. 20 U.S.C. §2701; see S. Rep. No. 146, 89th Cong., 1st Sess., reprinted in [1965] U.S. Code Cong. & Ad. News 1446, 1450; J.S. App. 8a. It is the largest single federally funded education program in the country, servicing approximately 4,800,000 children who attended public schools and 200,000 children who attended private schools during the 1979-1980 school year. Affidavit of Genevieve Dane, Program Operations Branch Chief in HEW's Division of Education for the Disadvantaged, sworn to April 20, 1979 ("Dane Aff."); J.S. App. 13a. Only 4% of the budget financed

remedial services for children attending nonpublic schools. Id.; J.S. App. 13a.

Under Title I, funds flow not to individual children or to individual schools, but to local public education agencies (LEAs) which must maintain exclusive direction and control over the provision of services. 45 C.F.R. §116.42; J.S. App. 11a. Only services which are not provided as part of a child's regular curriculum may be offered. Title I services must "supplement" rather than "supplant" the regular education program. 20 U.S.C. §§2734(f), 2736(c); J.S. App. 9a. Recipients of Title I services must meet two criteria: educational deprivation and residence in an area with a concentration of children from low income families. 20 U.S.C. §§2722, 2732-2734; J.S. App. 9a.

Title I services follow the child regardless of the school he attends. The Act specifically provides that services comparable to those offered to children attending public school be offered to children whose parents elect to send them to nonpublic schools. 45 C.F.R. §116a.23; J.S. App. 10a. Federal and local officials administering the statute have adhered to the view that services directed to nonpublic school children may be provided on the premises of the nonpublic institution. Wheeler v. Barrera, 417 U.S. 402, 421-23 (1974), judgment modified, 422 U.S. 1004 (1975); 45 C.F.R. §116a.23(f); Dane Aff. at ¶11; Affidavit of Lawrence F. Larkin, Director of the Bureau of Nonpublic School Reimbursable Services for the New York City Board of Edcuation, sworn to April 17, 1979 ("Larkin Aff."), ¶9; J.S. App. 9a. Services

to children who attend nonpublic schools are administered solely by public employees of the LEA. 20 U.S.C. §2734(m); 45 C.F.R. §§116.42,116a.23(f); J.S. App. 9a.

In 1976, a United States Office of Education study in Missouri concluded that services provided at times other than during the normal school day were not comparable. Affidavit of Joseph J. Vopelak, Acting Chief of the Institutional Services Section, Program Support Branch, in HEW's Division of Education for the Disadvantaged, sworn to April 20, 1979 ("Vopelak Aff."), ¶14; J.S. App. 13a. Initial determinations of noncomparability have been made for more than fifty other Missouri districts. Id. ¶16. In New York City, it was decided to provide Title I remedial services directly on the premises of the nonpublic schools during regular school hours, only after experi-

menting with alternative ways to deliver comparable services failed. Larkin Aff. ¶¶135, 136; Defendants' Exh. L. at 3 (Statement by Board on Title I Proposals, dated August 31, 1966); J.S. App. 14a.

ARGUMENT

The court below correctly concluded that in Establishment Clause adjudication there is no per se rule. Instead, a court faced with a First Amendment challenge must undertake "a careful evaluation of the facts of the particular case." Wheeler v. Barrera, supra, 417 U.S. at 426. "First Amendment implications may vary according to the precise contours of the plan that is formulated." Id. at 426. Accordingly, the court rejected as contrary to Wheeler (J.S. App. 8a), appellants' contention that "the issue in this case is not what is actually done; the issue

in this case is what is authorized by the law which we are challenging." The court held that it could not "rule on the basis of even well-founded hypotheticals in the absence of evidence concerning a concrete program." J.S. App. 30a.

The court correctly concluded that resolution of the issue required the court to apply the three-part test established by the Supreme Court:

> First, the statute must have a secular legislative purpose. ... Second, it must have a "primary effect" that neither advances nor inhibits religion... Third, the statute and its administration must avoid excessive government entanglement with religion. (citations omitted).

Meek v. Pittenger, 421 U.S. 349, 358 (1975).

First, the legislative history of Title I clearly demonstrates that the purpose of the statute was to give aid to needy

children, regardless of where they attend school. See 20 U.S.C. §2701; S. Rep. No. 146, 89th Cong., 1st Sess., reprinted in [1965] U.S. Code Cong. & Ad. News 1446, 1450; J.S. App. 20a. Nor do plaintiffs suggest that the enactment of Title I was motivated by an impermissible congressional purpose or design. J.S. App. 20a.

Second, confining itself to the undisputed evidence presented by appellees, the court unanimously found that "neither the statute nor the programs it has engendered constitute a vehicle for advancing religious education." J.S. App. 25a. This conclusion is based upon the court's examination of a fourteen year record "that demonstrated to the court's satisfaction that the program has remained free from religious influences and has not promoted the religious mission of the nonpublic

schools." J.S. App. 29a.

To emphasize the factual nature of its holding, the court noted the extensive evidentiary record before it and termed this record a "critical feature distinguishing this case from prior decisions" of the Supreme Court (J.S. App. 36a):

> The evidence presented in this action includes: extensive background information on Title I; an in-depth description of New York City's program; a detailed review of Title I rules and regulations and the ways in which they are enforced; and the testimony and affidavits of federal officials, state officers, school administrators, Title I teachers and supervisors, and parents of children receiving Title I services.

The court concluded that the "evidence establishes that the result feared in other cases has not materialized in the City's Title I program." J.S. App. 36a.

The Court's ultimate conclusion is based upon a number of subsidiary factual findings. First the Court found "uncontroverted evidence" that the inner-city parochial schools where Title I services are provided "do not have the characteristics of the pervasively sectarian schools described by the Supreme Court." J.S. App. 31a. Title I teachers "do not perceive a 'dominant sectarian mission' and have not been subject to religious pressures or influences in the parochial schools in which they work." J.S. App. 31a. "Title I materials and equipment are not diverted from their intended use and do not promote any religious activity. In short, the publicly owned instructional materials do not support the collective educational enterprise of the parochial school." J.S. App. 33a-34a. The Court further found that "[a]lthough

physically unified, secular and sectarian instruction remain educationally distinct. Title I classrooms are free from religious symbols, contain separate materials and equipment, and are run solely by public school employees who are not subject to the supervision of private school administrators." J.S. App. 34a.

In sum, the court found extensive evidence to support its conclusion that Title I as implemented in New York City did not have the primary effect of advancing or inhibiting religion. J.S. App. 37a. The court's finding of no violation, conceded by appellants' counsel prior to and during trial (Trial Transcript, May 10, 1979, 8, 68, 105, 112; J.S. App. 7a), warrants an affirmance by this Court.

Finally, the three-judge district court unanimously concluded, as a factual matter, that New York City's Title I nonpublic school program does not involve an "excessive entanglement" between the government and religious institutions. J.S. App. 47a.

To satisfy the third element of the tripartite Establishment Clause test "Title I must avoid 'excessive entanglement' between the government and institutions." J.S. App. 37a. "While recognizing that some interaction is inevitable, the Supreme Court has sought to prevent the intrusion of either into the realm of the other." Id. "The test is inescapably one of degree." Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

Although the court was fully cognizant that the Supreme Court has previously held that "[t]he prophylactic contacts required

to ensure that teachers play a strictly nonideological role ... necessarily give rise to a constitutionally intolerable degree of entanglement between church and state" (Meek, supra, 421 U.S. at 370, citing Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)), the district court nevertheless unanimously concluded that "the evidence in this case establishes that New York City's Title I program neither creates excessive administrative entanglement nor results in divisive political fragmentation" thereby distinguishing Meek from the case at bar. J.S. App. 47a. That determination, unless found to be clearly erroneous, must be affirmed by this Court.

The district court premised its conclusion on major distinctions in the program as operated in New York City for a period of over fourteen years and other programs which

the Court has held unconstitutional. See Opinion below, J.S. App. 37a-47a. First, the Court in Meek and Lemon had found that schools which are pervasively sectarian create a danger that religious doctrine will permeate secular instruction and constant surveillance would therefore be necessary to insure that teachers do not engage in the impermissible fostering of religion. Meek, supra, 421 U.S. at 370, 372; Lemon, supra, 403 U.S. at 619. But since the typical nonpublic school where services are provided in New York does not fit the Supreme Court's profile of a pervasively sectarian institution (J.S. App. 31a, 40a), and the Title I personnel assigned to the nonpublic schools do not perceive a dominant sectarian mission or atmosphere in the schools in which they teach (id.), "the need for continuous surveillance to guard against the danger is

correspondingly reduced." J.S. App. 41a.

Second, whereas the Supreme Court had held in Meek that the district court had "erred in relying entirely on the good faith and professionalism of the secular teachers... to insure that a strictly non-ideological posture is maintained" (Meek, supra, 421 U.S. at 349), the district court did not have to rely on the good faith of Title I teachers and supervisors" (J.S. App. 41a), since "the affirmative evidence before this Court establishes that Title I personnel have not fostered religious views or advanced religious activities." J.S. App. 41a (emphasis in original). The court states at J.S. App. 42a:

> Furthermore, the undisputed testimony of numerous Title I personnel demonstrates that they strictly adhere to the regulations restricting their own activities and the use of materials, and that they view

> their role as independent of the nonpublic schools' instructional program. [Citations to affidavits omitted].

The district court therefore unanimously concluded that "because the aid provided under Title I does not result in an 'impermissible fostering of religion,' the 'continuing surveillance' deemed necessary in Meek is not required to guard against the advancement of religious views or pursuits." J.S. App. 42a.

To the extent that "this case involves public supervision on the premises of the parochial schools, an arrangement that the Meek Court considered excessively entangled" (J.S. App. 42a), the district court found ample evidence to distinguish Meek. The Title I classrooms are free from religious influences and are distinct from the facilities used by the nonpublic school for regu-

lar instructional activities (J.S. App. 43a; Larkin Aff. ¶107); Title I supervisors maintain a complete separation between Title I activities and the regular programs of the parochial schools (J.S. App. 44a; Larkin Aff. ¶78); the supervisor reviews and evaluates only the performance of the Title I teacher in the Title I classroom (J.S. App. 44a); routine administrative contacts that occur between Title I personnel and nonpublic school administrators fall within the realm of permissible government-church contacts (J.S. App. 44a-45a) since "[m]inor administrative contacts between public employees or officials and religious authorities do not violate the Establishment Clause (J.S. App. 44(a), citing, Wolman v. Walter, 433 U.S. 229, 246 n.13 (1977) and Walz v. Tax Comm'n, supra, 397 U.S. at 674-76.).

Finally, the district court found that Title I is fundamentally different from those educational programs which have been found to create "the potential for divisive religious fragmentation in the political arena." J.S. App. 46(a), citing, Tilton v. Richardson, 403 U.S. 672, 688 (1971). Since only four percent of the national Title I budget is allocated to nonpublic school students, and fewer than one-fourth of the parochial schools in New York City have Title I services on their premises, the court reasoned that legislative considerations of the statute and annual appropriations are far less likely to give rise to the political divisiveness along religious lines feared by the Court in Meek. J.S. App. 46a. "Indeed, although Congress has appropriated funds for Title I since 1965... no evidence of any 'divisive

religious fragmentation' has been presented." Id. (emphasis supplied).

In sum, the district court unanimously concluded that Meek is clearly distinguished from the case at bar in that "the evidence in this case establishes that New York City's Title I program neither creates excessive administrative entanglement nor results in divisive political fragmentation." J.S. App. 47a.

CONCLUSION

"Having considered all the evidence in this action" (J.S. App. 47a), the three-judge court unanimously concluded that "New York City's Title I program does not violate the First Amendment's prohibition against the establishment of religion." Id. That decision based on controlling law, unless clearly erroneous, requires affirmance by this Court.

July 24, 1980.

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel of
the City of New York
Attorney for Appellee
Chancellor of the
Board of Education of
the City of New York
100 Church Street
New York, N.Y. 10007
(212) 566-2201, 2187

LORNA BADE GOODMAN
MARY C. TUCKER
Of Counsel.

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MOTION TO DISMISS OR AFFIRM

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over this appeal because plaintiffs failed to file their notice of appeal within sixty days after entry of judgment in the district court.

2. Whether a program of the City of New York, carried out under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. (Supp. II) 2701 *et seq.*, to provide remedial educational services, is consistent with the requirements of the Establishment Clause of the First Amendment.

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Pursuant to Rule 16 of the Rules of this Court, the Solicitor General, on behalf of the federal appellees, moves that the appeal be dismissed, or, in the alternative, that the judgment of the three-judge district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-48a), is reported at 489 F. Supp. 1248.

JURISDICTION

The judgment of the district court was entered on April 30, 1980 (J.S. App. 49a-50a). The notice of appeal was evidently mailed on May 27, 1980 (App., *infra*, 5a; J.S. App. 51a-52a), but it was not recorded as filed until July 15, 1980 (see App., *infra*, 2a). The Jurisdictional Statement was filed on June 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The Elementary and Secondary Education Act of 1965, as amended by the Education Amendments of 1978 (20 U.S.C. (Supp. II) 2701 *et seq.*), provides in pertinent part:

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[1] As explained at pages 13-14, *infra*, we question this Court's jurisdiction.

Section 2701. In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children. * * *

Section 2740(a). To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate * * *. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) (1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally

deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, the Commissioner shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section.

(2) If the Commissioner determines that a local educational agency has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, he shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section, upon which determination the provisions of subsection (a) of this section shall be waived.

STATEMENT

A. Proceedings Below

Appellants, a group of taxpayers and a taxpayer organization, commenced this action on February 25, 1976, to challenge the constitutionality of Title I of the Elementary and Secondary Education Act of 1965, insofar as it authorizes the expenditure of federal funds to finance the provision of remedial services by local public school districts to non-public school students on the premises of their schools during school hours. Appellants sought both declaratory relief and an injunction to prohibit the expenditure of public funds for this purpose.

The parties originally named as defendants included the Secretary of Health, Education, and Welfare and the United States Commissioner of Edu-

cation [2] and the Chancellor of the Board of Education of the City of New York.[3] In addition, two groups of parents and non-public school students were permitted to intervene as defendants by order of the district court dated February 2, 1977.

Following the convening of a three-judge court pursuant to 28 U.S.C. (1970 ed.) 2282,[4] and the denial, on March 3, 1978, of appellants' alternative motions for summary judgment or a preliminary injunction (446 F. Supp. 193), the district court heard evidence concerning the administration of the challenged program at both the federal and the local levels. On the basis of that evidence, the court concluded that the uncontested evidence presented to it established that the program, as administered by the Board of Education of the City of New York, had a secular purpose and did not have a primary effect of advancing religion or involve excessive administrative or political entanglement of the public authorities with the non-public schools. The court therefore held that the program, as administered in New York City, did not violate the Establishment Clause.

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[2] These two officials were responsible for federal administration of the Elementary and Secondary Education Act. Their role has since been assigned to the Secretary of Education (Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677), and she has accordingly been substituted as an appellee in this case. See Fed. R. Civ. P. 25 and Fed. R. App. P. 43.

[3] The Chancellor is responsible for administration of all Title I remedial education programs undertaken by the Board of Education of the City of New York (Exh. U, Tab. A-4, ¶ 27).

[4] This statute was repealed by the Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119. Section 7 of the 1976 Act (90 Stat. 1120) provides that it does not affect actions commenced prior to the date of enactment.

B. The Title I Program

The Elementary and Secondary Education Act of 1965 was enacted to address the effects of poverty on educational underachievement. 20 U.S.C. (Supp. II) 2701.[5] Title I of the Act provides federal reimbursement for programs, proposed and administered by local public school districts (local educational agencies, or "LEA") to assist children in low-income areas to overcome learning deficiencies. Typically, these programs involve remedial education as well as clinical and guidance services for the children (J.S. App. 15a, 16a).[6]

Under the terms of the statute, children who reside in low income areas and who meet objective criteria of educational underachievement are eligible to participate in such programs. 20 U.S.C. (Supp. II) 2734(a), 2733. The statute is intended to benefit children enrolled in public and in non-public schools; the local public school districts are admonished to ensure "equitable" participation in their Title I programs by eligible children from the non-public schools.

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[5] As the Senate Report noted, the Act was intended to "bring better education to millions of disadvantaged youth who need it most." S. Rep. No. 146, 89th Cong., 1st Sess. 5 (1965).

[6] Under Title I, the local public school district proposes to the state public school authorities educational programs that it deems appropriate for overcoming learning handicaps of eligible children within the district. The state agency is authorized to approve those local programs that provide adequate assurance of effectiveness; the expenses of the approved programs are then reimbursed by federal monies transferred to the state public education agency, which in turn disburses the funds to the local public school districts (J.S. App. 9a).

20 U.S.C. 2740(a). See *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 (1974).[7]

The governing regulations require that Title I services be provided at those locations where the needs of the children can best be met (45 C.F.R. 116a.19(c)). Since the local public school district must provide for the equitable participation of eligible children from non-public schools, the Title I services may, at the option of the local district, be provided on the premises of the non-public school (J.S. App. 10a). The Act and regulations contain a number of specific restrictions to ensure that the public school district retains direct control of all such programs and that none of the monies or equipment employed to provide Title I services goes to the non-public schools themselves (J.S. App. 11a). For example, payments are authorized only to finance the cost of programs that will supplement, rather than replace, programs the schools would have provided in the absence of Title I funds (20 U.S.C. (Supp. II) 2736(c); 45 C.F.R. 116a.23(f), 116.40); all Title I services must be provided solely by publicly employed personnel (45 C.F.R. 116.42), who may be made available other than on public school premises only to the extent necessary to provide services to those educationally deprived children for whom the Title I projects were designed (45 C.F.R. 116a.23(f)). Moreover, Title I funds and property must be administered and controlled by the public school authorities (20 U.S.C. (Supp. II)

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[7] Nationwide, approximately 5,000,000 children are enrolled in programs funded under Title I, of whom about 200,000, or 4%, are students in non-public schools (J.S. App. 13a). The Title I budget for fiscal year 1980 is estimated to be $2,600,000,000, of which $105,200,000, or 4%, will be expended on services for eligible children who are not enrolled in public schools (J.S. App. 13a; Exh. U, Tab. A-1, ¶ 3).

2734(m)), who must maintain both title to and sole physical control of the property, and must remove it from the premises of the nonpublic school, if necessary, to prevent its being used for any purpose other than as part of the Title I project (45 C.F.R. 116.42).

The local school district submits to the state a plan describing in detail the manner in which its Title I program is carried out (Exh. T, ¶¶ 10-12).[8] In turn, the state submits a triannual monitoring and enforcement plan to the federal government, which includes a description of how the state will monitor the performance of the local districts and specific assurances that the provision of services will comply with all Title I rules and regulations (Tr. 55).

Apart from regular field supervision by the public school district of its own Title I teachers and other professionals (J.S. App. 17a-18a), both the state and the federal Department of Education carry out periodic inspections to ensure not only that the services funded under the Act are being provided, but also that the very strict rules that assure the purely secular nature of the program and its independence from the non-public schools are being observed (Tr. 55). This monitoring is solely of the performance of the Title I personnel—that is, the public employees—and does not involve any inquiry into the manner in which the non-public school conducts its own affairs (J.S. App. 44a).

C. New York City's Title I Program

The New York City Board of Education, as the public school district for the City, administers the largest Title I program in the country (J.S. App.

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[8] Pursuant to a pretrial agreement, most of defendants' evidence was presented in the form of a narrative summary, introduced as Exhibit T.

13a).[9] For the 1978-1979 school year, a total of 404,686 public and non-public school children were eligible for Title I services in New York City, of which 33,285, or approximately 8.2%, were enrolled in non-public schools (J.S. App. 14a).[10] Due to budget limitations, only a portion of the eligible children could receive services, and, as a consequence, approximately 13,265 non-public school children were expected to participate in the Title I program (J.S. App. 14a).

Eligibility for participation in the Title I program requires that the child reside in a low-income area and be educationally deprived. The Board has established objective standards to measure both of these statutory criteria, without regard to whether the child is attending a public or non-public school (Exh. T, ¶¶ 35-41).[11] Consistent with the statutory require-

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[9] The remedial services supplied under Title I by the New York City Board of Education include a corrective reading program, a reading skills program, a corrective mathematics program, and a program to teach English as a second language. In addition, the Board provides psychological, guidance and counselling services for those Title I children whose ability to take advantage of the remedial program is impaired by emotional, family or related problems (J.S. App. 16a).

No services are provided under Title I that would otherwise be supplied by the schools attended by the eligible children, regardless of whether they are public or non-public. Indeed, no remedial services are provided for non-public school students until the Board specifically determines that such services are not being provided by the school (J.S. App. 15a).

[10] Accordingly, approximately 8% of the Title I funds are directed to children enrolled in non-public schools (J.S. App. 24a). See 20 U.S.C. (Supp. II) 2740(a).

[11] In determining whether a child in a non-public school is educationally deprived, the Title I teacher administers Board-approved tests to measure achievement levels (Exh. T. ¶ 63 (d)).

ment that Title I services be provided in the location where the needs of the children can best be met, those services are typically provided to the children on the premises of their school, whether public or non-public, during school hours. This course has been followed because prior experience by the Board of Education with off-premises and after-hours Title I programs proved such programs ineffective in serving the remedial purposes of Title I (J.S. App. 14a-15a).[12]

All teachers and other professionals who provide services under Title I are regular salaried employees of the Board, and are subject solely to its supervision and control (J.S. App. 16a). Their religious affiliation has no bearing on their assignment to the non-public school Title I program (J.S. App. 16a-17a). Similarly, religious faith or affiliation has no effect on the decision to assign a teacher to a particular non-public school (*ibid.*).[13] The vast majority of Title I personnel work in more than one non-public school each week (J.S. App. 17a).

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[12] Lack of student attendance, inability to recruit teachers for such programs, logistical problems, and parent resistance all contributed to the failure of such alternatives for non-public school children (J.S. App. 14a). The same problems were found by the United States Office of Education in its study of similar arrangements in the State of Missouri (J.S. App. 12a-13a).

[13] Although a substantial majority of the Title I teachers who provide remedial services to eligible children on the premises of non-public schools have a different religious affiliation from that of the schools at which they conduct their classes (J.S. App. 17a), there is no known instance of any non-public school authority even suggesting to the Board that a Title I teacher be transferred or removed for religious reasons (J.S. App. 17a).

All Title I personnel who perform any services on the premises of non-public schools are given specific written rules of procedure that detail the requirements that all such services are to be provided solely by them and solely pursuant to the direction and authority of the Board (J.S. App. 17a).[14] Moreover, these requirements are further emphasized orally when the teachers are given their orientation interviews and in-service training by their supervisors (J.S. App. 17a).[15] Since the Title I teachers are answerable only to the Board, they have only minimal contact with the principal of the non-public school (J.S. App. 44a). The Title I teachers' contacts with the faculty of the non-public school are also limited (J.S. App. 17a); there is an explicit prohibition on team teaching, or any other participation by Title I

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[14] For example, when Title I services are provided to eligible children on the premises of non-public schools, the room used is required to be free of all religious symbols or representations (J.S. App. 18a). Usually that room is reserved solely for use by the Title I personnel and is closed or locked when not in use for that purpose (J.S. App. 18a; Exh. T, ¶ 86). Moreover, the Board requires that all equipment and materials used in the Title I program—all of which are chosen by the Board—be clearly labelled as Title I property and be locked in cabinets or similar safe places when not being used by the Title I teachers (J.S. App. 18a; Ex. T, ¶ 81).

[15] Supervision of the Title I teachers is by the Board's own supervisory personnel, who make periodic classroom visits to review teaching techniques and also to ensure that the Title I teachers are adhering to the Board's rules of total independence from the non-public school administration (J.S. App. 17a-18a). In addition, both the state and the federal Department of Education representatives on occasion make field inspections to observe the performance of the Title I personnel and review the manner in which the Board is administering the program (Tr. 55).

teachers in the internal functions—whether educational or religious—of the non-public school (*ibid.*).[16]

D. The Decision of the District Court

The district court emphasized (J.S. App. 8a, 47a-48a) that it was considering only the constitutionality of Title I programs administered by the Board of Education of the City of New York, in light of this Court's admonition that First Amendment challenges to aid-to-education programs must be determined on a case-by-case basis by careful examination of the manner in which the particular program is designed and administered (*Wheeler* v. *Barrera*, *supra*, 417 U.S. at 426-427; *Tilton* v. *Richardson*, 403 U.S. 672, 681-682 (1971)).

Applying the traditional tripartite test for educational aid programs challenged under the Establishment Clause,[17] the court held that the purpose of Title I was to improve the educational performance of underprivileged children, a clearly secular goal, and that the primary effect of the statute was secular (J.S. App. 20a-37a). The court relied upon the fact that Title I, on its face and as implemented in New

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[16] Title I teachers do consult on an informal basis with the regular teachers of each participating child to obtain necessary information about his academic performance and problems. This informal consultation, an essential part of the remedial process, must occur whether or not the child attends a non-public school, and wherever the Title I classes are held (*e.g.*, Exh. U, Tabs A-6, ¶ 20; A-7, ¶ 16; A-8, ¶ 16).

[17] As stated in *Wolman* v. *Walter*, 433 U.S. 229, 236 (1977):

> In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion.

York City, provides educational assistance directly to children in need, and not to any school or other institution; that the services provided do not directly or indirectly aid the non-public schools by financial contributions or substitution for services otherwise provided by those schools; that the program is directed to all children in need rather than solely to non-public school children (who in fact constitute a small minority of its beneficiaries); that the federal regulations and implementing procedures of the Board of Education specifically regulate the activities of Title I personnel and the use of Title I equipment, preventing their diversion to any activity other than the Title I program; and that those non-public schools on whose premises the Title I services are provided do not adhere to this Court's profile of the "pervasively sectarian" school.[18] Most importantly, the Court emphasized the fourteen-year experience with Title I, which was documented in detail in the record. That documentation revealed both a complete separation between the publicly-staffed Title I services and the activities of the schools, and an absence of any evidence that religion has ever intruded itself in any way into the operation of Title I.

For similar reasons, the court held that Title I did not involve excessive administrative or political en-

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[18] The district court derived that "profile" from *Meek* v. *Pittenger*, 421 U.S. 349, 356 (1975); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 767-768 (1973); and *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 476 (1973) (J.S. App. 29a). The court found that the New York schools did not fit the profile because they do not restrict student admission or teacher hiring on religious grounds, do not attempt to compel their students to accept or obey the doctrines of the sponsoring church or religious organization, and do not impose religious restrictions on the content of secular instruction (J.S. App. 31a).

tanglement between government and religious institutions (J.S. App. 39a-47a). The court also concluded that there was no evidence that Title I had ever generated any political strife along religious lines and no reason to anticipate such problems, because the program assists children in need without regard to their school enrollment, and does not require legislative appropriations that earmark separate funds for public and non-public schools or for the children attending public and non-public schools (J.S. App. 46a-47a).

ARGUMENT

1. The appeal should be dismissed for want of jurisdiction. 28 U.S.C. 2101(b) provides that a direct appeal from the district court to this Court, except from a final judgment holding unconstitutional an Act of Congress, "shall be taken" within sixty days from entry of the judgment. Rule 10 of the Rules of this Court prescribes the method by which an appeal is to be taken; that Rule requires the filing of a notice of appeal with the clerk of the federal court from which the appeal is taken. Failure to accomplish this task within the required sixty days deprives this Court of jurisdiction to entertain the appeal. *E.g.*, *California-Pacific Utilities Co.* v. *United States*, 410 U.S. 962 (1973); *Ward* v. *Winstead*, 400 U.S. 1019 (1971). See Sup. Ct. R. 11. See also *Scarborough* v. *Pargoud*, 108 U.S. 567, 568 (1883).

In this case, the final judgment of the district court was entered on April 30, 1980, thus requiring the appeal to be filed by June 29, 1980. A review of the docket sheet in the district court discloses, however, that the notice of appeal was not filed until July 15, 1980 (App., *infra*, 1a). On their face,

therefore, the records of the district court indicate that this appeal was not timely taken, thus depriving this Court of jurisdiction.

Appellants' counsel nevertheless asserts that he mailed the notice of appeal to the clerk of the district court on May 27, 1980 (App., *infra*, 5a). Copies of the notice of appeal were served on defendants' counsel at that time. The July 15 filing resulted from a subsequent delivery of a notice of appeal, after the original could not be found (*id.* at 3a-4a). In these circumstances, it may be that the May 27 mailing of the notice of appeal, in ample time for it to reach the court and be timely filed, suffices to constitute a "filing" by appellants, if this Court concludes that here, as in *Fallen* v. *United States*, 378 U.S. 139, 144 (1964), appellants "had done all that could reasonably be expected to get the letter to its destination within the required [60] days." If so, in this case, as in that one, this Court may conclude that "[s]ince [appellants] did all [they] could under the circumstances, we decline to read the Rules so rigidly as to bar a determination of [this] appeal on the merits" [*ibid.*]. Cf. *Da'Ville* v. *Wise*, 470 F.2d 1364 (5th Cir. 1973). But see *Richardson* v. *Green*, 130 U.S. 104, 111-112 (1889).

2. If the Court concludes that it has jurisdiction of this case, then we submit that it should affirm the decision of the district court for the reasons stated by that court, which correctly applied the standards established by this Court to the essentially undisputed facts. As we demonstrate below, appellants' objections to the decision are plainly insubstantial.

a. Appellants' primary claim is that federal funding of remedial education services to children on the

premises of religious schools during school hours is *per se* unconstitutional under the Establishment Clause. That contention has been repeatedly rejected by this Court. See, *e.g.*, *Tilton* v. *Richardson*, *supra*, 403 U.S. at 681-682; *Wolman* v. *Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring). Indeed, this Court in *Wheeler* v. *Barrera*, *supra*, 417 U.S. at 426-427, emphasized the importance of "a careful evaluation of the facts of the particular case" in refusing to consider the constitutionality of the precise aspect of the Title I program to which appellants here object. That decision is flatly inconsistent with the *per se* approach urged here.

Appellants nevertheless contend that *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D. N.J. 1973), aff'd, 417 U.S. 961 (1974), and *Meek* v. *Pittenger*, 421 U.S. 349 (1975), establish the *per se* rule they advocate. But this interpretation of *Meek* was explicitly rejected in *Committee for Public Education and Religious Liberty* v. *Regan*, No. 78-1369 (Feb. 20, 1980), slip op. 14.

b. Appellants also apparently contend (J.S. 11-12) that Title I as administered unconstitutionally "foster[s] an excessive government entanglement with religion." *Wolman* v. *Walter*, *supra*, 433 U.S. at 236.[19]

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[19] Appellants did not contest below, and do not here challenge, Title I's satisfaction of the other two elements of the constitutional test defined in *Wolman*—a secular legislative purpose and a primary effect that neither advances nor inhibits religion (433 U.S. at 236). Such challenges would, in any event, be unavailing. The secular purpose of Title I—"to provide needed assistance to educationally deprived *children* rather than to specific schools" (*Wheeler* v. *Barrera*, *supra*, 417 U.S. at 406)—is implemented by a program carefully designed to avoid any assistance to religious schools. The record amply supports the district court's conclusion that

As described by this Court, administrative entanglement consists of "comprehensive, discriminating, and continuing state surveillance" to ensure against sectarian use of government funded equipment or programs, including "state inspection and evaluation of the religious content of a religious organization," and thus "excessive government direction of church schools and hence of churches." *Lemon* v. *Kurtzman*, 403 U.S. 602, 619-620 (1971). The record here plainly demonstrates that the New York City Title I program involves no such entanglement.

The Title I personnel are all public school teachers or other publicly-employed specialists, whose only task is to perform purely secular remedial or guidance services for children in need. Most personnel are itinerant, spending only a part of their time in any one non-public school, and usually in a room reserved exclusively for Title I purposes. All personnel receive clear instructions not to engage in school activities, including team teaching, and all are monitored by local, state and federal inspectors, who do not, however, review in any way the operations of the non-public school.[20] The minimal contacts between Title I personnel and non-public school administrators

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any effect of the New York program on religion is minimal. See pages 8-11, *supra*. Cf. *Americans United for the Separation of Church and State* v. *Blanton*, 433 F. Supp. 97 (M.D. Tenn.), aff'd, 434 U.S. 803 (1977) (statute providing aid to all needy college students, including those in religious colleges, does not have prohibited effect on religion).

[20] Although plaintiffs claim in their Jurisdictional Statement that these field inspections constitute an intrusion into the operations of the non-public schools and entangle government with religion (J.S. 11-12), the undisputed evidence is to the contrary and the district court correctly so found (J.S. App. 44a).

are principally logistical in nature, and serve only to provide the public school authorities with lists of potentially eligible children, and to arrange for the schedule and location of Title I classes.[21] In short, the Title I classroom is, as the district court concluded, in effect a public school within a non-public school (J.S. App. 43a). The government's monitoring of what occurs in that classroom is no more entangling than the government monitoring of teaching at the "neutral sites" involved in *Wolman* v. *Walter*, *supra*, 433 U.S. at 248. The Title I classroom is no less such a site than is a mobile van parked at the curb next to the non-public school. See *id.* at 245 n.12. See also *Nebraska State Bd. of Education* v. *School District of Hartington*, 409 U.S. 921, 924-926 (1972) (denying certiorari) (Brennan, J.).

The record here also refutes any suggestion that Title I might cause excessive political entanglement resulting in political fragmentation along religious lines. There is simply no evidence of such a phenomenon after fourteen years of operation of the statute. Nor is this surprising since, unlike such invalidated programs as the Pennsylvania statute described in *Meek*, Title I provides assistance to all eligible children, not merely those in non-public schools (who constitute a small minority of participating children), and does not require annual appropriations of funds earmarked for non-public schools or the students attending them. A lump sum for all operations is appropriated by Congress, and the New York City Board of Education allocates the funds ad-

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[21] The minimal administrative contacts between public and non-public authorities are similar to the type of contacts upheld in *Wolman* v. *Walter*, *supra*, 433 U.S. at 246 n.13. See also *Walz* v. *Tax Commission*, 397 U.S. 664, 674-676 (1970).

ministratively in accordance with an objective formula that ensures comparable services to needy children, whatever schools they attend (J.S. App. 46a-47a).

c. Finally, appellants contend that Title I is not meaningfully distinguishable from the state program invalidated in *Meek* v. *Pittenger*, *supra*. They are wrong. First, the program in *Meek* was directed solely to non-public school children, 421 U.S. at 352-353, 364, whereas under Title I these children are a small minority of the participants. As noted, this difference significantly decreases the potential for political fragmentation (compare 421 U.S. at 372 with J.S. App. 46a-47a).

Second, in *Meek* the evidence as to how the program was intended to be operated was sparse, and did not demonstrate that assurance against sectarian influence on the remedial classes could be achieved without involving the state in monitoring the internal operations of the non-public schools; thus, this Court noted that the program relied, for its assurance against sectarian influence, solely on the "good faith and professionalism" of the remedial teacher (421 U.S. at 369).[22] In striking contrast, the evidence here

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[22] Moreover, the schools in *Meek* were pervasively sectarian (421 U.S. at 371), thus apparently increasing the danger of sectarian pressures being exerted on the remedial teachers. In contrast, the evidence here demonstrated, and the court found, that the non-public schools on whose premises Title I services are dispensed in New York do not exhibit the principal characteristics of the pervasively sectarian school and that none of the Title I teachers had ever experienced such pressures (J.S. App. 40a).

Plaintiffs argue at length in their Jurisdictional Statement that the evidence established that the non-public schools in question in New York do fit the pervasively sectarian profile

demonstrates beyond question that the New York City Title I program is so designed and administered that, as the district court held, it poses neither a cognizable danger of sectarian influence, nor any need for interference with the internal operations of the non-public school (J.S. App. 41a-45a).[23]

Third, the challenged program in *Meek* had only been enacted the year before, and there was simply no evidence as to whether in practice the program could be operated free of either sectarian interference with the public school teachers or government interference with sectarian institutions. In this case, in contrast, there is a fourteen-year record, fully documented below and demonstrating a complete absence of any evidence of such interference. There was no showing that Title I services or equipment have ever been used for non-Title I purposes, that there ever was any attempt to do so, or that the means em-

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(J.S. 9-11). This is untrue, as the district court's opinion makes clear. (J.S. App. 30a-32a). The testimony of Dr. John Ellis cited by plaintiffs was entirely hypothetical in nature (see Tr. 40-65), and constituted no more than the repeated statement that the Department of Health, Education, and Welfare would not prohibit use of federal funds to pay for Title I services even if the school on whose premises the services were provided did adhere to the profile. The uncontradicted evidence below, however, established that the New York non-public schools affected do *not* fit the profile.

[23] For example, the record here shows that all remedial teachers visit a number of schools, usually of a different religious persuasion than their own. This lack of professional or personal identification with any particular school minimizes the risk involved in "performing important educational services in schools in which education is an integral part of the dominant sectarian mission" that concerned the Court in *Meek, supra*, 421 U.S. at 371.

ployed by the Board of Education to protect against such abuse have ever involved any interference with the non-public schools.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction. If the Court concludes that the notice of appeal was timely filed, the judgment of the district court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

APPENDIX

TENNEY, J.

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BLANKINSHIP, JOHN D., CORBETT, JACK, FLAST, FLORENCE, FORDHAM, JEFFERSON, GUNN, ANDREW LEE, HELLER, HELEN C., NEIER, ARYEH, RYOR, JOHN, SHANKER, ALBERT, SQUADRON, HOWARD M., WAMBLE, G. HUGH and WOOD, JAMES E., PLAINTIFFS.

v.

MATHEWS, F. DAVID—Secretary of the United States Dept. of Health, Education, and Welfare; BELL, TERREL H.—United States Comissioner of Education; and ANKER, IRVING—Chancellor of the Board of Education of the City of New York, DEFENDANTS.

Cause: Action for injunction and declaratory judgment.

Attorneys

Leo Pfeffer
15 East 84th Street
New York, N.Y. 10028
tele: (212) 879-4500

AUSA Michael H. Dolinger-791-1959
W. Bernard Richland
Municipal Bldg. NY 10007

DATE	NR.	PROCEEDINGS
02-25-76	1	Filed complaint and issued summons.
03-01-76	2	Filed Summons with Marshal's Return. Served: Terrel H. Nell by Certified Mail #285700, 2/26/76 Atty Gen. Wash. D.C. " " #555891 " " "
		* * * *
4-18-80	49	Fld Opinion #49942, that the Court concludes that NYC Title I program does not violate the 1st Amendment's prohibition against the establishment of religion, no constitutional infirmity has been revealed on the facts of this case, accordingly, both the statute and the City's program survive judicial scrutiny, Van Graafeiland, CJ, Tenney, J. Broderick, J. mn
4-30-80	50	Fld Judgment that the defts have judgment dismissing the complaint, Clk mn
7-15-80	51	Fld pltff's Notice of Appeal to the Supreme Court of the U.S. from judgment on 4-30-80, mn to Robert B. Fiske, Jr. US Atty, W. Bernard Richland, Howard I. Rhine, Dennis Rapps, David J. Martin, Williams & Connolly, and Martin, Obermaier & Morvillo.

LEO PFEFFER
ATTORNEY AT LAW
15 E. 84 Street
New York 26, N.Y.
TRAFALGAR 9-4500

July 3, 1980

Michael Rodak, Jr., Clerk
United States Supreme Court
Washington, D.C. 20543

Re: National Coalition for Public Education and Religious Liberty, et al. v. Shirley M. Hufstedler, Secretary of the United States Department of Education, et al.

Dear Sir:

On June 27th, while I was out of town, my secretary received a call from your office requesting that I serve three copies of the Jurisdictional Statement in this case on the Solicitor General, and that I send to your office a copy of the Notice of Appeal showing the date when it was filed. I have mailed the three copies to the Solicitor General.

I went to the office of the Clerk of the District Court but after a thorough search, the original Notice of Appeal could not be found. I thereupon sent to the Clerk's office a duplicate copy of the Notice of Appeal.

I immediately went to the offices of the U.S. Attorney for the Southern District and of the Corporation Counsel of the City of New York, both defendants in the action, and ascertained from them that they had received copies of the Notice of Appeal

served upon them by mail. I enclose photostat copies showing the date (May 29) when they had received the Notice of Appeal.

I enclose herewith copies of the relevant correspondence and of the Notice of Appeal, showing receipt of them by the United States Attorney and the Corporation Counsel.

I trust this satisfactorily clears up the matter.

Very truly yours,

LEO PFEFFER
Attorney for Appellants

Encl.

May 27, 1980

Raymond F. Burghardt, Clerk
United States District Court
Southern District of New York
One St. Andrew's Plaza
New York, N.Y. 10007

Re: National Coalition for Public Education and Religious Liberty, et al. v. Patricia R. Harris, Secretary of the United States Department of Health, Education and Welfare, et al.
76 Civ. 888

Dear Sir:

I enclose herewith, for filing, the Notice of Appeal with proof of service in the above entitled case.

Yours truly,

LEO PFEFFER
Attorney for Plaintiffs-Appellants

Encl.

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